14

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1918

No. [redacted]247

JAMES J. BROUGHAM AND ARTHUR N. STANKEY,
APPELLANTS,

vs.

BLANTON MANUFACTURING COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED AUGUST 16, 1917.

(26096)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 629.

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vs.

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a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1917, of said court before the Honorable Walter H. Sanborn and the Honorable Walter I. Smith, circuit judges, and the Honorable Charles F. Amidon, district judge.

Attest:

[SEAL.]

E. E. KOCH,
Clerk of the United States Circuit of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit: On the first day of October, A. D. 1915, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Eastern District of Missouri was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein James J. Brougham and Arthur N. Stankey were appellants and Blanton Manufacturing Company was appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, is in the words and figures following, to wit:

1 (Citation.)

The United States of America to Blanton Manufacturing Company, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, Eighth Circuit, at St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to an order granting an appeal filed in the Clerk's office of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein James J. Brougham and Arthur N. Stankey are appellants and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellants, as in said order of appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable David P. Dyer, Judge of the District Courts of the United States within and for the Eastern District of Missouri, this 20th day of October in the year of our Lord one thousand nine hundred and fourteen.

DAVID P. DYER,
United States District Judge,
For the Eastern District of Missouri.

Due service of the foregoing citation is hereby acknowledged this 20th day of October, 1914.

SHEPARD BARCLAY,
Of Attorneys for Blanton Mfg. Co., Complainant.

2 Endorsed: Filed in the District Court on Nov. 4, 1914.

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3 United States of America,
Eastern Division of the Eastern Judicial District of Missouri—ss.

In the District Court of the United States, in and for said division of said district.

Be it remembered, that heretofore to-wit on the twenty-fourth day of February, in the year of our Lord, One Thousand Nine Hundred and Fourteen, there was filed in the office of the Clerk of the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, a certain Bill of Complaint, in cause numbered 4262, wherein Blanton Manufacturing Company is complainant, and James J. Brougham, Arthur N. Stankey, Alonzo D. Melvin and David F. Houston are Defendants, which said bill of complaint is in words and figures as follows, to-wit:

4

Bill of Complaint.

In the District Court of the United States
In and for the Eastern Division of the
Eastern Judicial District of Missouri.

September Term, 1913.

Blanton Manufacturing Company, Plaintiff,

vs.

James J. Brougham, Arthur N. Stankey, Alonzo D. Melvin and David F. Houston, Defendants.

In Equity, No. 4262.

Eastern Division of the Eastern Judicial District of Missouri—ss:

To the Honorable, the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, and to each of the Honorable, the Judges thereof:

The plaintiff, your orator, Blanton Manufacturing Company, a corporation, by its solicitors, complains of said defendants, of a wrong and injury arising under the Constitution and laws of the United States within the jurisdiction of this Court whose remedial process plaintiff invokes by this suit in Equity, praying proper relief appropriate to the facts, that is to say:

First. Plaintiff, your orator, respectfully states that it is the Blanton Manufacturing Company, and since the 5th day of November, A. D. 1904, it has been and is now a corporation duly incorporated and organized under the general laws of the State of Missouri concerning manufacturing and business corporations, having full power to do all the acts herein mentioned as having been by it done, and having its chief office in the City of St. Louis, Missouri, and being now and having been since the date last above mentioned, a citizen of the State of Missouri and a resident of the Eastern Division of the Eastern Judicial District of Missouri; and that said defendants are officers and employes of the Government of the United States, under and subject to the laws thereof, namely:

Dr. James J. Brougham, a citizen of the State of Missouri and a resident of the City of St. Louis therein, in said Eastern Division of said District, and who is and for several

5 years last past has been Chief Inspector (at said City) of the Bureau of Animal Industry of the Department of Agriculture of the United States, duly qualified and acting as such an inspector in charge and direction of said Bureau in said City:

Arthur N. Stankey, who is a citizen of the State of Missouri, resident in said City of St. Louis, and is a local in-

spector of said Bureau of Animal Industry and as such now is, and for a long time last past has been, in charge of the inspection for said Bureau of Animal Industry at the manufacturing plant of plaintiff in said City of St. Louis, having been stationed there, as plaintiff is informed and believes, by his superior officers of said Bureau, and subject to the orders of said Dr. Brougham, as inspector in charge thereof at St. Louis;

Alonzo D. Melvin, whose citizenship is at present unknown to plaintiff, but whom plaintiff knows as the Chief of the said Bureau of Animal Industry, and a resident at the City of Washington, in District of Columbia; and

Honorable David F. Houston, who, as plaintiff is informed and believes, is a citizen of Missouri and a resident of the said City of St. Louis, and who is at the present time (and since March 4, 1913, has been) Secretary of Agriculture of the United States, the official head of said Bureau of Animal Industry, which Bureau is a part of the Department of Agriculture of the Government of the United States, and is subject to the laws thereof;

Second. The grounds upon which the jurisdiction of this Court depends are that the matter in controversy exceeds in amount (exclusive of interest and costs) the sum or value of five thousand dollars, and that this suit in Equity, moreover, arises under the internal revenue laws, the trade-mark laws and other laws of the United States, and involves the construction and application of the Constitution and laws of the United States, the effect of which plaintiff, your orator, prays may be applied for the protection of the rights of plain-
6 tiff in and to the trade-mark, trade-name, labels, stencils and business of plaintiff in the circumstances described in this bill;

Third. For many years last past the plaintiff, your orator, has been and is now the manufacturer of Oleomargarine, which plaintiff for many years last past has sold and offered for sale in packages of various sizes, labeled or marked with the trade-mark and trade label or stencil of the plaintiff, designed and adopted by the plaintiff for that purpose, which trade-mark is the word "Creamo", as applied and affixed to or upon packages of Oleomargarine of plaintiff's manufacture, which trade name has been in exclusive use by plaintiff for said purpose since the time of the said incorporation of plaintiff in 1904, and which said trade name and mark, "Creamo" Oleomargarine, had been previously approved for such use by the Internal Revenue Department of the United States by the Acting Commissioner of Internal Revenue of the Treasury Department of the United States Government,

and which approval for such use was later confirmed in December, 1906, during the incumbency of Hon. Leslie M. Shaw as Secretary of the Treasury of the United States, during the Administration of Theodore Roosevelt as President of the United States; and the business and trade of plaintiff, your orator, in the manufacture and sale of Oleomargarine under the trade-mark aforesaid, is now and for many years last past has been extensive and valuable, and the rights of plaintiff, your orator, of, in and to the use of said trade name and mark, and in and to the use thereof, affixed or attached by labels, stencils and otherwise to and on packages of Oleomargarine, sold by the plaintiff, your orator, have become of great value, the loss or destruction of or injury to which would cause a serious and irreparable pecuniary injury to plaintiff, your orator; and by reason of the long experience and industry of the plaintiff in said business of the manufacture of said Oleomargarine, distinguished from other brands or kinds of Oleomargarine by plaintiff's said trade-mark "Creamo" Oleomargarine on labels approved by the Bureau of Animal Industry in 1907, said Oleomargarine made by plaintiff and so sold has become widely known
7 in Missouri and throughout the United States as a valuable and useful article of commerce, and has acquired a high reputation, and has commanded and continues to command an extensive sale, which is and has been a source of profit to the plaintiff, and of increasing value yearly; that plaintiff's said article is known to the public and to dealers, buyers and consumers thereof by said name of "Creamo" Oleomargarine on said labels, and by the plaintiff's said device and trade-mark and name upon the article as sold by plaintiff and by dealers therein and to consumers who have become thereby well acquainted with plaintiff's said product of manufacture under said name, mark and label, which now possess, and for a long time past have possessed a good will of much value to plaintiff, the impairment, interruption or injury whereof would cause serious pecuniary injury to plaintiff in a sum exceeding five thousand dollars, the exact amount whereof plaintiff is unable at this time more definitely to state.

The form in which plaintiff's said trade-mark of "Creamo" Oleomargarine was so approved by said Bureau of Animal Industry in 1907, and has since been in use by plaintiff upon packages of Oleomargarine manufactured and sold by plaintiff, is as follows:



8 Plaintiff is using and has used the above trade-mark in the form of said "Creamo" Oleomargarine, of plaintiff's make and manufacture, upon small packages, of one pound each; and in marking for sale its two, three and five pound packages of said product, plaintiff has used a similar label, containing the same trade-mark of "Creamo" Oleomargarine with plaintiff's name as well as the name of the place of manufacture (St. Louis, U. S. A.) and a memorandum of the fact of United States Inspection thereon, the form of which labels has also been separately approved by said Bureau of Animal Industry, as shown by a letter of the said defendant Dr. Brougham, Inspector in charge at St. Louis, July 8, 1912, (a copy whereof is herewith filed marked "Exhibit B" and made part of this bill).

Furthermore, the plaintiff, your orator, on the 6th day of January, 1908, duly applied for registration of its said trade-mark "Creamo" in the Patent Office of the United States and accordingly on the 9th day of June, 1908, said trade-mark "Creamo" for Oleomargarine was duly registered as such (numbered 69,352) in said Patent Office, and a certificate thereof duly issued to plaintiff on said last named date by the Acting Commissioner of Patents of the United States; and plaintiff thereafter has enjoyed the use and exclusive trade privilege of employing and using said name or mark on Oleomargarine, manufactured by plaintiff, and at the present time plaintiff, your orator, has outstanding many contracts with dealers engaged in the sale thereof under said trade name and mark upon the label above exhibited and has expended large sums of money for the purpose of making dies and plates for

the printing of like labels for packages of Oleomargarine to be sold under said trade-mark "Creamo" as above shown so that any interruption or cessation of the sales, now continuously going on, of such Oleomargarine manufactured by the plaintiff, your orator, under said trade-mark "Creamo" Oleomargarine designated by said trade label, would be extremely injurious and financially damaging to plaintiff, your orator, and reasonable compensation for any such injury would be impracticable to ascertain in view of the na-
9 ture of the property right of the plaintiff, your orator, in said trade-mark and label therewith as an instrumentality of commerce in the sale of the Oleomargarine of plaintiff's manufacture.

Not only in the manufacture of said Oleomargarine, which is an article of food, but likewise in the dressing and marking of plaintiff's said Oleomargarine for sale, plaintiff now exercises and for many years last past has exercised great care, so that any and all packages containing said "Creamo" Oleomargarine which are offered for sale by plaintiff, bear a label or brand thereon, having said trade-mark "Creamo" Oleomargarine exhibited in the form already shown herein by the label aforesaid, with a statement of the place (St. Louis) where said article is manufactured or produced; and truly stating the distinctive name of the contents as Oleomargarine, which is an article of food widely used, and known to the public and to many traders therein throughout the United States, and to consumers thereof; and plaintiff takes special care and exercises great diligence to keep the quality of said "Creamo" Oleomargarine (when offered for sale and when sold by plaintiff) good, wholesome, sanitary and healthful without any poisonous or deleterious ingredients of any sort therein, and without any false or misleading label or description whatsoever thereon, and said "Creamo" Oleomargarine is not otherwise offered for sale or sold by plaintiff, at any place, to any trade dealer, customer or buyer whatsoever.

Plaintiff has gone to great pains, trouble, care and expense, through many years until the present time, to produce a meritorious article of food and of commerce, in said Oleomargarine, and to deserve the custom, patronage, trade and good will which plaintiff now enjoys in the sale of its said "Creamo" Oleomargarine under the label set out above, and now known to plaintiff's customers far and wide by said label and trade name and mark.

The manufacturing plant and establishment of plaintiff is now, and for many years last past has been, situated in said City of St. Louis, on Spruce and Second Streets there-
10 in, and comprises a group of buildings, specially ar-

ranged, fitted and equipped for the purpose of such manufacture, and where plaintiff has made an investment of many thousands of dollars for the establishment, maintenance, improvement and development of the manufacture of Oleomargarine, and where plaintiff has carried on and is now carrying on the manufacture of "Creamo" Oleomargarine, as already described, the good will thereof has become a large part of the value of the property of plaintiff, invested in said plant and establishment.

Plaintiff further states that as a manufacturer of Oleomargarine as aforesaid, it has been and is now duly licensed and bonded to the United States Government as such, and has paid the special tax required under the Act of Congress of August 2, 1886, (as amended by the Act of Congress of May 9, 1902) concerning Oleomargarine, and plaintiff is now complying and has heretofore duly complied with the requirements thereof touching the filing of notices, inventories and bonds with the Collector of Internal Revenue of the district in which plaintiff's said manufactory is located and has duly complied with the laws and with the regulations of the Commissioner of Internal Revenue in regard to the conduct of plaintiff's said business as such manufacturer of Oleomargarine; and plaintiff has packed and is continuously packing the "Creamo" Oleomargarine aforesaid, in such packages as are prescribed by the regulations of the [of the] Commissioner of Internal Revenue; and said packages of Oleomargarine of plaintiff are duly marked, stamped and branded for sale, as prescribed by the regulations of said Commissioner under section six of said Act of Congress of August 2, 1886, and the ingredients thereof are subject to examination by the said Commissioner under said Internal Revenue laws concerning Oleomargarine, and the said Commissioner, prior to as well as in the year 1906, during the incumbency of Hon. Leslie M. Shaw as Secretary of the Treasury of the United States, approved and sanctioned the use by plaintiff of the trade name and label of "Creamo" Oleomargarine
11 (above exhibited herein) as applied to the Oleomargarine manufactured by plaintiff, and as so marked by label or brand on packages thereof for sale by plaintiff, which approval, as plaintiff is informed, advised and verily believes, is yet in full force and effect.

Plaintiff further states that in the year 1906, after the enactment of the Act of Congress, approved June 30, 1906 (34 Statutes at Large 674) concerning the inspection of "meat and meat food products", said defendant Dr. Brougham, as inspector in charge of the Bureau of Animal Industry of the Department of Agriculture of the United States, at the said City of St. Louis as aforesaid, notified plaintiff that the plant

and manufactory of plaintiff was subject to inspection under said last named Act of Congress, and that without such inspection, none of the Oleomargarine produced by plaintiff's said factory would be suffered or allowed by the United States to be shipped into other States from St. Louis, Missouri, as part of interstate commerce, under the heavy penalties denounced by said last cited Act of Congress. To said claim, the plaintiff, by its President at the time, duly protested verbally and objected to said Dr. Brougham, as inspector in charge, as aforesaid; yet, nevertheless, in order to avoid controversy, plaintiff deemed it expedient to have such proposed inspection of its manufactory rather than to hazard its large and valuable interstate commerce in Oleomargarine; so an inspector of said Bureau was accordingly installed at plaintiff's said manufactory, which inspector acts under orders of said Bureau of Animal Industry, pursuant to said last cited Act of Congress of June 30, 1906; and plaintiff has conformed to the lawful regulations of said Bureau, although plaintiff is advised and believes and hence charges that the inspection of plaintiff's manufactory of Oleomargarine is not within the lawful jurisdiction, power or authority of said Bureau, and that plaintiff is entitled of right to carry on its local and its interstate commerce in the products of its said factory without the said inspection by the inspector of said Bureau, who, at this time, is defendant Stankey, stationed thereat.

12 Plaintiff further states that, during the administration of Hon. James Wilson, Secretary of Agriculture of the United States, in the year 1907, the said trade-mark of plaintiff, "Creamo", and the label (as above recited) exhibiting same, as applied to Oleomargarine manufactured by plaintiff at its said factory and as affixed by said label to packages thereof for sale, was duly submitted to the Bureau of Animal Industry of said Department of Agriculture and after certain suggestions by the Chief of the Inspection Division thereof had been made and accepted by plaintiff, the said trade-mark and label of plaintiff: "Creamo Oleomargarine", printed and displayed in the label for packages thereof (as shown herein by the sample exhibited) as so approved by said Department, in the year 1907, was continued in use by plaintiff for purposes of commerce and in reliance and on the faith of said sanction and approval plaintiff proceeded to utilize said trade label and mark, and to expend large amounts of money to extend the popularity and publicity thereof, and has since greatly increased the sales and good will of said "Creamo" Oleomargarine, under said mark and approved label of plaintiff.

That notwithstanding the facts aforesaid, said Dr. Broug-

ham, defendant, who at the City of St. Louis, Missouri, is the inspector in charge of the said Bureau of Animal Industry of the Department of Agriculture of the United States, has (as representative of said Bureau as aforesaid) threatened and notified plaintiff, your orator, that from and after the first day of March, 1914, the use by plaintiff of its said trade name, mark and label of "Creamo", as above set out, and as applied to and upon Oleomargarine manufactured or sold by plaintiff, "will not be allowed"; as shown by letter of said defendant to the solicitor of plaintiff, a copy whereof is herewith filed marked "Exhibit A" and made a part of this bill; and plaintiff, your orator, upon information and belief avers that said defendant, Stankey, the local inspector at plaintiff's said manufactory and plant in St. Louis, will enforce said threat and notice, and plaintiff is informed and believes that all of defendants will, on and after
13 March 1, 1914, as a part of the operations of said Bureau of Animal Industry, attempt to prevent and interfere with the use and enjoyment by plaintiff of its said trade-mark and label "Creamo" (as hereinbefore depicted) in the manufacture and sale of Oleomargarine, and will attempt to prevent thereby to deprive plaintiff of its valuable rights and property therein and (as plaintiff is advised and believes) without lawful authority or jurisdiction so to do, and without due process of law, in violation of the laws of the United States and of the rights, privileges and immunities of plaintiff secured to it by the Constitution of the United States, and especially by the fifth Amendment thereof; that plaintiff is advised that said threatened acts of defendants are unlawful and are contrary to equity and good conscience; and plaintiff avers that if said threats are carried out and executed, the damages to plaintiff and its business will exceed the sum or amount of ten thousand dollars, and that a great part of the value and good will of said trade-mark and label consists in the continuous use of same among the traders, dealers and customers, who have become accustomed to buy, use and consume said "Creamo" Oleomargarine as so sold by plaintiff under said name and label; and that any cessation of the continuous shipment, use and sale of the same as now and heretofore customary to plaintiff's trade, would, as plaintiff verily believes, injuriously affect the business of plaintiff to an amount in excess of five thousand dollars.

Plaintiff further states that said trade-mark of plaintiff (as shown upon the form of the label hereinbefore copied and reproduced in this bill) has been duly registered by plaintiff as a trade-mark in the office of the Secretary of State of

Missouri under the laws of that State, as well as in the Patent Office of the United States under the laws thereof.

Fourth. The parties defendant herein are all officers of the Department of Agriculture of the United States, and the cause of action herein averred has arisen in this Eastern Division of this District wherein said manufactory of plaintiff is situated and in active business operation.

14 Fifth. Plaintiff avers further that it is informed and verily believes that unless duly restrained by process, said defendants will execute the threat aforesaid and will attempt to interfere with and prevent the use by plaintiff of its said trade-mark and label on and after March 1, 1914, to the great injury and damage of plaintiff and of its business and property as aforesaid, and that in the circumstances described a recovery of damages therefor would be inadequate, and that plaintiff, in said premises above described, is remediless according to the strict rules of the common law, and can have or obtain no adequate relief except in this Court as a court of equity, and to the end, therefore, that the defendants may, if they can, show why the plaintiff may not have the relief hereby prayed and make a full discovery and disclosure of all the matters aforesaid, according to the best and utmost of their knowledge, remembrance, information and belief, and full, direct and perfect answer make to the matters hereinbefore charged (but not under oath the same being hereby expressly waived), plaintiff further prays that this Court may grant to plaintiff a writ of injunction, issuing out of and under the seal of this Honorable Court, perpetually enjoining and restraining said defendants from [interferring] with the use and enjoyment by plaintiff (in interstate commerce or otherwise) of its said trade-mark "Creamo" Oleomargarine upon its labels now in use in its said business as above described, and from attempting to deprive plaintiff of the use thereof, and to order and grant to plaintiff a provisional or temporary injunction forthwith restraining said defendants and each of them from so interfering with said use and enjoyment of said trade mark upon its labels aforesaid; and may grant to plaintiff such other and further relief, whether general or special, as the equity of the case may require and to the Court may seem fit.

May it please the Court also to grant unto plaintiff not only a writ of injunction conformable to the prayer of this bill, and the other and general relief prayed, but also a writ of summons in due course, directed to the said defend-

15 ants, commanding them to appear and answer unto this petition and to abide and perform such order and decree in the premises as to the Court shall seem proper and

as may be justly required by the principles of equity and good conscience, and that the plaintiff may have such other and further relief as may be just and in conformity to the principles and practice of Courts of Equity of the United States; and plaintiff will ever humbly pray, etc.

BARCLAY, ORTHWEIN & WALLACE,
SHEPARD BARCLAY,
Solicitors and of Counsel for said Plaintiff.

SHEPARD BARCLAY,
Of Counsel for Plaintiff.

State of Missouri,
City of St. Louis—ss.

David A. Blanton of lawful age, having been first duly sworn, says on his oath that he is, and has been for many months last past, President of the Blanton Manufacturing Company, the plaintiff in the above entitled cause, and that he is duly authorized by said Company to make this affidavit on its behalf, and that the matters and facts stated in the foregoing petition are true, except as to those matters therein stated on information or belief or as matters of opinion, and those matters the affiant verily believes to be true.

DAVID A. BLANTON.

Subscribed and sworn to before me, the undersigned, by the above named affiant who is personally known to me to be the same person whose name is above subscribed, this 24th day of February, 1914.

W. W. NALL,
(Seal) Clerk United States District Court.

16 "Exhibit A"

United States Department of Agriculture
Bureau of Animal Industry,
Local Office.
924 Chemical Bldg.,
St. Louis, Mo., February 10th, 1914.

Judge Shepard Barclay,
Rooms 311-312,
Commercial Bldg., City.

Dear Sir:—

Referring to your letter of February 9th, relative to a copy of a letter to The Blanton Co. on the subject of a trade label "Creamo." You are advised that if I do not receive instructions to the contrary between this date and March 1st, on and after that date, the use of that label will not be allowed. I can not state whether further consideration of this subject would be given by our Bureau if requested; however this sub-

ject has been under consideration for some time and I suppose has been referred to our legal department for advice.

Very respectfully:

(Signed) JAS. J. BROUGHAM,
Inspector in Charge.

"Exhibit B"

United States Department of Agriculture,
Bureau of Animal Industry.
Local Office,
924 Chemical Bldg.,
St. Louis, Mo;
July 8th, 1912.

The Blanton Co.,
115 Spruce St.,
St. Louis, Mo.,

Gentlemen:

Enclosed find "Creamo Oleomargarine" Trade Label which has been approved by the [Wasington] office.

Very respectfully,

(Signed) JAS. J. BROUGHAM.
Inspector in Charge.

P. S. When the original Trade Label is finished, please send three copies to this office.

J. J. B.

17 (Subpoena in Chancery).

United States of America,
Eastern Division of the Eastern
Judicial District of Missouri—Set.

In the District Court of the United States in and for Said Division of Said District.

The President of the United States of America, To James J. Brougham, Arthur N. Stankey, Alonzo D. Melvin and David F. Houston—Greeting:

You are hereby commanded to be and appear at and before the District Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, on Monday, March 16th, 1914, at the City of St Louis, then and there to answer the bill of complaint of Blanton Manufacturing Company, citizen of the State of Missouri, filed against you on the twenty-fourth day of February, 1914; hereof fail not.

Witness, the Honorable David P. Dyer, Judge of the District Courts of the United States within and for the Eastern District of Missouri, the 24th day of February, 1914.

Issued at Office in the City of St. Louis, under the Seal of said District Court, the day and year last aforesaid.

(Seal). W. W. NALL, Clerk.

Memorandum: The Defendant is required to file answer or other defense in the Clerk's office on or before the twentieth day after service, excluding the day thereof;
18 otherwise, the bill may be taken pro confesso.

W. W. NALL, Clerk.

(Marshal's Return).

United States of America, Eastern Division of the Eastern Judicial District of Missouri—ss.

I do hereby certify that at the City of St. Louis, Mo., in the Eastern District of Missouri, on the 25th day of February, A. D., 1914, I executed this writ by delivering a true and correct copy of this writ to the within named James J. Brougham and Arthur N. Stankey, personally.

Alonzo D. Melvin and David F. Houston could not be found within the Eastern District of Missouri.

EDW. F. REGENHARDT,
U. S. Marshal, Eastern District of Missouri.
By W. G. DAVIS, Deputy.

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19 (Order, February 25, 1914, Application for Issuance of Temporary Injunction set down for Hearing.)

Now at this day comes said complainant by its solicitor, and comes also the United States Attorney appearing for the defendant Brougham; whereupon, by consent of parties, it is Ordered that the application of said complainant for the issuance of a temporary injunction in this cause be and the same is set for hearing on February 28th, 1914 at eleven o'clock A M., at which day and hour the said defendants may show cause, if any they have, why such injunction should not be granted and issued in conformity to the prayer of complainant's bill of complaint. Notice of application filed.

February 25th, 1914.

(Signed) DAVID P. DYER,
Judge.

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20 (Order to show Cause, February 28, 1914.)

St. Louis, Feb'y. 28th, 1914.

Now comes said complainant by its solicitors, and the defendants Brougham and Stankey appear by Hon. Chas. A. Houts, United States Attorney, and by Hon. W. P. Jones, Solicitor for the Department of Agriculture; and the complainant having duly submitted to the Court its sworn bill of complaint and exhibits thereto, and the Court having

heard argument of counsel and being now fully advised of the application for a temporary restraining order, it is now Ordered by the Court that said defendants show cause and make return, herein, on or before March 16th, 1914, why a temporary injunction should not be granted as prayed in said complainant's bill, and that in the meanwhile said defendants desist from interfering or from attempting to interfere with the use by said complainant of its label and of its said alleged trade name, as described in said bill of complaint, until the further order of this Court.

(Signed) DAVID P. DYER, Judge.

Approved as to form,

CHARLES A. HOUTS,
United States Attorney.

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21 (Order of Submission, March 17, 1914.)

Now at this day comes the said complainant by its solicitor and also the defendants, Brougham and Stankey, appearing by the United States Attorney for the Eastern District of Missouri, and file their joint answer to the Bill of Complaint in this cause.

And this cause now coming on to be tried before the Court upon the said bill of complaint and the said answer thereto, the introduction of evidence is commenced and concluded, and the cause is submitted to the Court with leave to said complainant to present a brief in Ten (10) days and with leave to said defendants to reply thereto within Ten (10) days thereafter.

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22 Separate Answers of Defendants James J. Brougham and Arthur N. Stankey.

Now come defendants James J. Brougham and Arthur N. Stankey, and for their answer to the bill of complaint filed herein admit the incorporation and residence of the plaintiff as set out in said bill of complaint; and admit the residence, citizenship and official position of each of the defendants mentioned in said bill of complaint as described therein.

Defendants further admit that plaintiff has been for many years, and is now, a manufacturer of oleomargarine; that plaintiff has sold oleomargarine and offered it for sale in packages of various sizes and labeled or marked with the trade label or stencil "Cremo", but as to whether or not said trade label or stencil has been in exclusive use by the plaintiff since 1904, and as to whether or not said trade name and mark had been previously approved for such use by the Internal Revenue Department of the United States, or by the Acting Commissioner of Internal Revenue of the Treasury Department, and as to whether or not said use of said

23 trade name or mark was confirmed in December, 1906, during the incumbency of Honorable Leslie M. Shaw as secretary of the Treasury, these defendants have no knowledge.

And these defendants further say that they have no knowledge as to whether or not the business and trade of plaintiff in the manufacture and sale of oleomargarine under said trade mark is or has been extensive in value; nor have they any knowledge as to whether the use of said trade name and mark by plaintiff has become of great value; nor have they any knowledge as to whether or not the loss or destruction or injury to said use of said trade name or mark would cause a serious, irreparable and pecuniary injury to plaintiff; nor have defendants any knowledge as to whether or not the oleomargarine manufactured by plaintiff under said trade name and mark has become widely known in Missouri and throughout the United States as a valuable and useful article of commerce and has acquired a high reputation and has commanded and continues to command an extensive sale which is and has been a source of profit to the plaintiff and of increasing value yearly; nor have defendants any knowledge as to whether or not plaintiff, by the sale of its said oleomargarine and the use in connection therewith of said trade name and label, has acquired a good will in its business of any value; nor have defendants any knowledge that any impairment or injury to said good will would cause pecuniary injury to plaintiff in any sum whatever.

And defendants further [says] that they have no knowledge as to whether or not plaintiff applied for and secured registration of its said trade-mark "Creamo" in the patent office of the United States, but defendants say that if registration thereof was obtained, as alleged in said bill of complaint, such registration conferred no authority for plaintiff's use of said trade name and trade mark in connection with the sale and shipment of plaintiff's oleomargarine under
24 the facts and circumstances as hereinafter in this answer disclosed.

And defendants also further say that they have no knowledge as to whether or not plaintiff has complied with the laws and regulations of the Commissioner of Internal Revenue with regard to the conduct of plaintiff's business as to the manufacture and sale of oleomargarine; nor have defendants any knowledge as to whether or not the packages of oleomargarine produced and sold by plaintiff are marked, stamped and branded for sale as prescribed by the regulations of the Commissioner of Internal Revenue; nor have defendants any knowledge as to whether or not the Commissioner of Internal Revenue in the year 1906 approved and sanctioned the use by

plaintiff of the trade name and label described in plaintiff's bill of complaint in connection with the manufacture and sale of oleomargarine, but defendants say that if plaintiff has duly complied with the rules and regulations prescribed by the Commissioner of Internal Revenue, and if the use of said trade name and label was approved by the Commissioner of Internal Revenue, said facts confer no authority upon plaintiff to use said trade name and label under the facts and circumstances hereinafter in this answer set out.

Defendants, further answering, deny that during the administration of Honorable James Wilson, Secretary of Agriculture of the United States, the said label set out and described in the bill of complaint was submitted to and approved by the Bureau of Animal Industry; and deny that said label as set out and described in plaintiff's bill of complaint was ever approved by the Secretary of Agriculture, or by anyone acting for him.

Defendants, further answering, say that the oleomargarine manufactured, produced and sold by plaintiff is a food and meat, or meat food, product which has been and is being sold and offered for sale by plaintiff in interstate and foreign commerce, and that it is subject to the provisions of both the
25 Meat Inspection Act and the Food and Drugs Act; that said oleomargarine so produced and sold by plaintiff is, prior to its being offered for sale, packed in cartons and other receptacles or coverings of the kind and character described by the fifth paragraph of said Meat Inspection Act; that said fifth paragraph of said act provides as follows:

"No such meat or meat food products shall be sold or offered for sale by any person, firm or corporation in interstate or foreign commerce under false or deceptive name; but established trade name or names which are usual to such products; and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted."

That on or about the _____ day of _____, 19__, the Secretary of Agriculture, pursuant to the authority vested in him by law, duly promulgated certain regulations governing the use of trade names and trade labels in connection with the manufacture and sale of meat or meat food products in interstate commerce, and among others Regulation 18, which said Regulation 18 contains the following provisions:

"Section 2—Duplicate copies of each trade label in the form of sketches or proofs shall first be submitted to the Department, and no trade label shall be used until a sketch or proof thereof has been approved. After trade labels are printed from approved proofs or sketches they shall be for-

warded in triplicate to the Department for approval and filing."

"Section 10—No meat or meat food products shall be sold or offered for sale by any person, firm or corporation under any false or deceptive name; but the established trade name or names which are usual to such products, which are not false and deceptive and which shall be approved by the Secretary of Agriculture, are permitted."

"Section 11—No picture, design or device which gives any false indication of origin or quality shall be used upon any label. The law prohibits any statement, design or device false in any particular regarding the virtues or properties of the materials contained in the package."

That pursuant to said Meat Inspection Act and said Regulations, and upon request from the Secretary of Agriculture, acting through his duly authorized subordinates, plain-
26 tiff submitted for the approval of the Secretary of Agriculture the trade label "Creamo Oleomargarine" set out and described in the bill of complaint herein; that thereupon and thereafter the Secretary of Agriculture, through his duly authorized subordinates, notified plaintiff on several occasions that said label and trade name was disapproved by the Secretary of Agriculture, although plaintiff was permitted the temporary use of said trade name and label during part of the year of 1912, until it had used up the supply of labels and cartons which it represented to the Bureau of Animal Industry that it had on hand during said year. After the said supply of labels and cartons had been exhausted by plaintiff in the year 1912, plaintiff was again notified that the Secretary of Agriculture had disapproved of the said label and trade name as set out and described in the bill of complaint.

And defendants say that during the past two years the approval of said labels and the use thereof by plaintiff have been the subject of discussion, both verbal and written, between plaintiff and the officials of the Bureau of Animal Industry, the latter acting on behalf of the Secretary of Agriculture; that the Secretary of Agriculture has at all the said times been willing, and has so informed plaintiff of his willingness, to approve said label and thereby permit its use in connection with the sale of plaintiff's product, providing plaintiff would place upon said label suitable words indicating that the words "Creamo Oleomargarine" constitute merely a trade name or brand, and the Secretary of Agriculture offered to approve said label modified so as to read "Creamo Brand Oleomargarine," providing said label should be used only upon oleomargarine containing not less than 10 per cent of cream.

27 And defendants say that plaintiff has refused to modify its said label as requested by the Secretary of Agriculture, and that plaintiff has used said label upon its said oleomargarine as aforesaid, for the purpose of deceiving and causing the purchasers thereof to believe that the said oleomargarine produced by it is made from and contains a substantial quantity of cream; and plaintiff by the use of said labels, and by the use of advertising matter and letterheads sent to its customers, has succeeded in inducing the belief on the part of said customers that said oleomargarine is manufactured from and contains a substantial quantity of cream, whereas in truth and in fact large quantities of the oleomargarine manufactured and sold by plaintiff under said label and trade name has contained no cream, and such of its product as has contained cream has contained not over 10 per cent of cream, and all of its product, both that containing cream and that containing no cream, has been sold under the same label and trade mark described in the bill of complaint.

And defendants say that because of the facts aforesaid, the said label, as so used by plaintiff, is deceptive and misleading, and that the Secretary of Agriculture, in exercising the discretion and judgment vested in him by law, has determined that said label is deceptive and misleading, and in consequence thereof has disapproved of said label and its use in connection with the manufacture and sale of plaintiff's said product.

28 And these defendants, further answering, say that it is their duty to inspect the product manufactured by the plaintiff and to attach to such of said product as they find to have been manufactured and labeled in accordance with law and the regulations of the Secretary of Agriculture a stamp showing that said product has been inspected and passed; that under the law and the rules and regulations in connection therewith these defendants can only pass such meat products as are sold under a trade name or label approved by the Secretary of Agriculture.

And these defendants say that when they notified plaintiff that the use of said trade name and label would not be allowed after the 1st day of March, 1914, they intended plaintiff only to understand, and plaintiff did so understand, that on and after said date the defendants would refuse to attach to the oleomargarine manufactured by plaintiff the Government stamp showing that said product had been inspected and passed, if said product should be sold under and have thereon the label or trade name described in the Bill of complaint; and that these defendants have and had no intention of interfering with plaintiff's use of said label otherwise than by reporting to the officers charged with the enforcement of the

law the facts with respect to the use of said label and with respect to the sale of such of plaintiff's product as did not bear the Government's stamp showing that the product had been inspected and passed by them.

Wherefore, having made full answer to the bill of complaint filed herein, these defendants asked to be hence dismissed, with their costs.

CHARLES A. HOUTS,
United States Attorney for Defendants.

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29 (Memorandum Opinion of the District Court, filed April 27, 1914.)

Dyer, J.

The complainant now is, and for many years last past has been, engaged in the manufacture and sale of oleomargarine in the City of St. Louis, and State of Missouri. The business of the complainant has steadily grown until its proportions are now very great. This, in spite of the fact that the annual license tax amounts to six hundred dollars, and in addition thereto a tax of ¼ of one per cent on each and every pound of white or uncolored oleomargarine manufactured by it, and ten cents a pound on each and every pound of colored oleomargarine manufactured by it, is imposed by law. The license tax of $600.00 per annum has to be paid at the beginning of each year, and the tax imposed upon each and every pound of white and colored oleomargarine has to be paid by the manufacturer before it is removed from the factory. Failure to comply with these requirements is followed by heavy penalties imposed upon the manufacturer. No package is allowed to leave the place of manufacture without being plainly marked "Oleomargarine". Failure to comply with the law in this regard imposes heavy penalties upon the manufacturer also. As far as the evidence shows in this cause the complainant has at all times complied with the law.

Prior to 1904 the complainant began the use of a brand or "trade mark" upon portions of its product, in the form following:

"The Blanton Co.
30 St. Louis.
Creamo
Oleomargarine.

This "trade mark" or brand (from the proof in the case) seems to have been approved by the Commissioner of Internal Revenue on the 19th of January, 1904.

After the meat inspection act was passed, June 30, 1906, the complainant submitted the same brand to the Bureau of Animal Industry, and it was officially approved by it, as

shown in a Department letter dated May 24, 1907, signed by Rice P. Steddon. To this letter is attached a sample of the label which in all respects is the same as the one appearing in the bill of complaint in this case.

The evidence shows that for more than five years the complainant used this label upon its products, not only without objection upon the part of the proper officers of the Government, but with their approval.

An attempt, it appears, is now made by those in authority to reverse the decisions of their predecessors and to require a change to be made in this particular brand or "trade mark".

The complainant has expended large sums of money in advertising and popularizing its product, covered by such brand. It would be inequitable upon the part of the Government and its officers to stand by, approve and acquiesce in this brand for five or six years, and then, at great loss to the complainant, refuse further to let its product be sold under this same brand.

The complainant is entitled to the relief prayed for in its bill. An order to that effect will be entered.

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31 (Final Decree, May 13, 1914.)

Blanton Manufacturing Company, Plaintiff,

v.

James J. Brougham, et al., Defendants.

Equity. No. 4262.

Eastern Division of the Eastern Judicial District of Missouri, ss:

Now again come the parties heretofore appearing herein, the plaintiff, Blanton Manufacturing Company by its solicitors, and James J. Brougham, as Chief Inspector in Charge of the Bureau of Animal Industry of the Department of Agriculture of the United States of America, and Arthur N. Stankey, inspector for said Bureau, defendants, by their solicitor, the Honorable, the United States Attorney for the Eastern Judicial District of Missouri; and this cause, having been heretofore fully heard by the Court upon the pleadings and all the evidence, proofs and arguments of the respective parties to this cause, and the same having been duly submitted to and considered by the Court, and being now sufficiently advised, the Court doth find that this cause is one arising under the constitution and laws of the United States; that the defendants aforesaid, having been duly served with process of summons herein and having heretofore duly appeared herein, by their said solicitor and counsel, that this Court has due and full jurisdiction of said cause, as well as over the said defendants, and the Court doth further find the issues herein joined

in favor of plaintiff, and that, on the facts averred in the bill of complaint, either admitted by said defendants or established by the testimony and proofs adduced, plaintiff is
32 entitled to the relief prayed in its said bill; now, therefore, it is adjudged, considered and decreed by the Court that said James J. Brougham as Chief Inspector in Charge of the Bureau of Animal Industry of the Department of Agriculture of the United States, and Arthur N. Stankey, as inspector for said Bureau, defendants, and their agents, successors and employees, jointly and severally, be and they are hereby perpetually enjoined and restrained from interfering with the use and enjoyment by plaintiff, its successors and assigns (in interstate commerce or otherwise) of its said trade-mark "Creamo", upon stencils and labels, as heretofore approved and used on packages of various sizes for the sale of Oleomargarine, substantially as described in plaintiff's bill of complaint herein in the form following:

The Blanton Co.
St. Louis
Creamo
Oleomargarine.

and that said defendants, their agents, successors and employees be further perpetually enjoined and restrained from attempting to deprive plaintiff, its successors and assigns, of the use of said brand, trade mark and label described in said bill of complaint, used upon packages of Oleomargarine manufactured, packed, sold or offered for sale by said plaintiff, its agents, successors, assigns or customers, in the prosecution or course of the business now conducted by plaintiff as manufacturer and vendor of Oleomargarine; and that plaintiff further recover of said defendants its costs in this behalf expended, and have execution therefor, as also such other process, original, ancillary or supplemental as may be appropriate to execute, carry out and enforce this decree.

May 13th, 1914.

(Signed), DAVID P. DYER,
Judge of said District Court.

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33 (Order, September 19, 1914, allowing Time to present Bill of Exceptions, etc.)

Now at this day come the defendants, James J. Brougham and Arthur N. Stankey, appearing by the United States Attorney for the Eastern District of Missouri, and on their motion it is

Ordered that the said named defendants be and they are hereby allowed to November 20th, 1914, to present their bill of exceptions in this cause, and that for the purpose of settling

and filing the said bill of exceptions this cause stand specially continued to the September Term, 1914, of this Court.

(Signed) DAVID P. DYER,
Judge.

Sept. 19th, 1914.

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34 (Petition for Appeal, etc., filed October 19, 1914.)

The above named James J. Brougham and Arthur N. Stankey, believing themselves aggrieved and injured by the order, judgment and decree entered by the Court in the above entitled cause on the 13th day of May, 1914, do hereby appeal from said order, judgment and decree to the United States Circuit Court of Appeals for the Eighth Circuit and pray that this, their appeal, may be allowed, and that a transcript of all the record, testimony, proceedings and papers in said cause and upon which said order, judgment and decree were made may be duly authenticated and sent to the said Circuit Court of Appeals for review and its consideration.

JAMES J. BROUGHAM,
ARTHUR N. STANKEY,
Defendants.
By ARTHUR L. OLIVER,
HOMER HALL,
their Attorneys.

An appeal is allowed as above prayed for this 19th day of October, 1914. (Signed). DAVID P. DYER,
District Judge.

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35 Order Allowing Appeal, October 19th, 1914.

Now come James J. Brougham and Arthur N. Stankey, two of the defendants in the above entitled cause, by their attorneys, and file and present to the Court their assignment of errors and their petition for an appeal from the order, judgment and decree entered in this cause on the 13th day of May, 1914, to the United States Circuit Court of Appeals for the Eighth Circuit; and it appearing to the Court that said defendants were officers of the United States and that all of the acts and things done by them and complained of in this action were done and about to be done in the discharge of their duties as such officers as they understood and intended; on due consideration of said petition for appeal and of said facts, it is

Ordered that said appeal be and it is hereby granted and allowed as prayed, and that no appeal bond be required of said defendants herein, nor any supersedeas granted.

Dated at St. Louis, Missouri, October 19th, 1914.

(Signed), DAVID P. DYER, Judge.

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36 Assignment of Errors of James J. Brougham and Arthur N. Stankey, Defendants.

Now come the above named defendants, James J. Brougham and Arthur N. Stankey, as appellants, and respectfully state and represent that they believe themselves aggrieved and injured by the order, judgment and decree entered by the United States District Court in the above entitled cause on the 13th day of May, 1914, and assign the following errors therein and thereto, to-wit:

First: The Court erred in its holding and finding that the said defendants and their agents, successors and employees jointly and severally ought to be perpetually enjoined and restrained from interfering with the use and enjoyment by the plaintiff and its successors and assigns of the alleged trade mark "Creamo" upon stencils and labels as heretofore approved and used on packages of various sizes for the sale of oleomargarine and substantially as described in plaintiff's bill of complaint and in the final decree of
37 the Court herein.

Second. The Court erred in holding, finding and decreeing that said defendants Brougham and Stankey, and their agents, successors and employes, be perpetually enjoined and restrained from attempting to deprive plaintiff and its successors and assigns of the use of said alleged brand, trade mark and label described in said bill of complaint herein used upon packages of oleomargarine manufactured, packed, sold or offered for sale by the plaintiff and its agents, successors, assigns or customers in the prosecution or course of business then conducted by plaintiff as manufacturer and vendor of oleomargarine.

Third. The Court erred in holding, finding and decreeing that the plaintiff was entitled to the relief prayed for in its bill of complaint and in entering a judgment and decree awarding to plaintiff such relief so prayed for.

Fourth. The Court erred in entering a decree for the plaintiff.

Fifth. The Court erred in holding and finding that the name or brand "Creamo" oleomargarine used by plaintiff was and is a trade-mark.

Sixth. The Court erred in holding and finding that the brand and label described and set forth in the bill of complaint was officially approved by the Bureau of Animal Industry and that for more than five years complainant [use] said label upon its products, without objection upon the part of the proper officers of the Government and with their approval.

Seventh. The Court erred in holding and finding that the plaintiff had a right to use a trade name, to wit, "Creamo Oleomargarine", without the approval of the Secretary of Agriculture.

Eighth. The Court erred in holding and finding that the plaintiff had a right to use the name "Creamo" upon its oleomargarine without the approval of the Secretary of Agriculture.

38 Ninth. The Court erred in holding and finding that the defendants Brougham and Stankey were not authorized and empowered to withhold from oleomargarine produced by plaintiff and labeled and branded "[Cremo] Oleomargarine" the stamp or mark "Inspected and Passed," when said name "[Cremo] Oleomargarine" did not have the approval of the Secretary of Agriculture.

Tenth. The Court erred in holding and finding that it would be inequitable upon the part of the Government and its officers to stand by, approve and acquiesce in this brand for five or six years, and then, at great loss to the complainant, refuse further to let its product be sold under this same brand.

Eleventh. The Court erred in holding and finding that these defendants, Brougham and Stankey, were not authorized and empowered to enforce the rules and regulations adopted and approved by the Secretary of Agriculture and the officers of the Bureau of Animal Industry of the Department of Agriculture which related and pertained to the oleomargarine produced by plaintiff and referred to in its petition.

Twelfth. The Court erred in holding and finding that the complainant was entitled to the relief prayed for in its bill, and in entering a judgment in accordance therewith.

Thirteenth. The Court erred in not entering a judgment and decree in favor of the defendants.

Fourteenth. The Court erred in admitting and considering incompetent, immaterial and irrelevant evidence and in basing its finding and decree thereon.

Wherefore, said appellants Brougham and Stankey pray for a reversal of said Order, Judgment and Decree.

ARTHUR L. OLIVER
HOMER HALL,
Attorneys for Appellants.

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39 (Order, November 10, 1914, extending Time to Present Bill of Exceptions.)

On motion of the defendants, Brougham and Stankey, appearing by the United States District Attorney, the Court doth

Order that they be and are hereby granted to January 15th, 1915, to present their bill of exceptions in this cause.

(Order, November 30, 1914, extending Time to file Transcript.)

September Term, 1914.

The above-named James J. Brougham and Arthur N. Stankey, defendants and plaintiffs in error, by their attorney, Homer Hall, Assistant United States Attorney, applying therefor,

40 It is ordered by the Court that the time for filing the transcript of the record in the above entitled cause in the office of the Clerk of the United States Circuit Court of Appeals, Eighth Circuit, be and it is hereby enlarged and extended until and during the 15th day of January, 1915.

(Signed) DAVID P. DYER, Judge.

Dated, November 30, 1914.

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41 (Order January 13, 1915, Extending Time to File Transcript.)

September Term, 1914.

The above-named James J. Brougham, and Arthur N Stankey, defendants and plaintiffs in error, by their attorney, Homer Hall, Assistant United States Attorney, applying therefor, it is

Ordered by the Court that the time for filing the transcript of the record in the above entitled cause in the office of the Clerk of the United States Circuit Court of Appeals, Eighth Circuit, be and it is hereby enlarged and extended until and during the 15th day of March, 1915.

Dated January 13, 1915.

(Signed), DAVID P. DYER, Judge.

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42 (Order, January 13, 1915, extending Time to present Bill of Exceptions.)

September Term, 1914.

The above named James J. Brougham and Arthur N. Stankey, defendants and plaintiffs in error, by their attorney, Homer Hall, Assistant United States Attorney, applying therefor, it is

Ordered by the Court that the time for filing bill of exceptions in the above entitled cause, be and it is hereby enlarged and extended until and during the 15th day of March, 1915.

Dated January 13, 1915.

(Signed), DAVID P. DYER, Judge.

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43 (Praecipe for Transcript on Appeal, filed March 9, 1915.)

To the Clerk of the District Court:—

You will please prepare and transmit to the Clerk of the United States Circuit Court of Appeals, Eighth Circuit, a typewritten transcript in the above entitled cause, containing the entire record in said cause.

JAMES J. BROUGHAM
ARTHUR N. STANKEY
By VANCE J. HIGGS,
Assistant United States Attorney.

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44 (Election as to Printing of Transcript, filed March 9, 1915.)

The above named James J. Brougham, and Arthur N. Stankey, defendants, and plaintiffs in error in the above entitled cause, hereby elect to take a typewritten transcript of the entire record in said cause, the same to be printed under the supervision of the Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

JAMES J. BROUGHAM
ARTHUR N. STANKEY
Plaintiffs in Error.
By VANCE J. HIGGS,
Assistant United States Attorney.

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45 (Order, March 10, 1915, extending Time to file Transcript.)

September Term, 1914.

The above-named James J. Brougham and Arthur N. Stankey defendants and plaintiffs in error, by their attorney, Vance J. Higgs, Assistant United States Attorney, applying therefor,

It is ordered by the Court that the time for filing the transcript of the record in the above entitled cause in the office of the Clerk of the United States Circuit Court of Appeals, Eighth Circuit, be and it is hereby enlarged and extended until and during the 15th day of April, 1915.

(Signed) DAVID P. DYER, Judge.

Dated March 10, 1915.

(Order, March 10, 1915, extending Time to present Bill of Exceptions.)

September Term, 1914.

The above-named James J. Brougham and Arthur N. Stankey defendants and plaintiffs in error, by their attorney,

Vance J. Higgs, Assistant United States Attorney, applying therefor,

It is ordered by the Court that the time for filing bill of exceptions in the above entitled cause be, and it is hereby, enlarged and extended until and during the 15th day of April, 1915.

(Signed) DAVID P. DYER, Judge.

Dated March 10th, 1915.

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46 (Order, April 15, 1915, extending Time to file Transcript.)

March Term, 1915.

The above named James J. Brougham and Arthur N. Stankey defendants and plaintiffs in error, by their attorney, Vance J. Higgs, Assistant United States Attorney, applying therefor,

It is ordered by the Court that the time for filing the transcript of the record in the above entitled cause in the office of the Clerk of the United States Circuit Court of Appeals, Eighth Circuit, be and it is hereby enlarged and extended until and during the 15th day of June, 1915.

(Signed) DAVID P. DYER, Judge.

Dated, April 15th, 1915.

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47 (Order, April 15, 1915, extending Time to present Bill of Exceptions.)

March Term, 1915.

The above named James J. Brougham and Arthur N. Stankey defendants and plaintiffs in error, by their attorney, Vance J. Higgs, Assistant United States Attorney, applying therefor.

It is ordered by the Court that the time for filing bill of exceptions in the above entitled cause, be and it is hereby enlarged and extended until and during the 15th day of June, 1915.

(Signed) DAVID P. DYER, Judge.

Dated April 15, 1915.

(Order, June 9, 1915, extending Time to present Bill of Exceptions.)

By consent of parties, the Court doth

Order that the defendants, Brougham and Stankey, be allowed to July 1st, 1915, to present their bill of exceptions in this cause.

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48 (Bill of Exceptions, filed June 22, 1915.)

Be it remembered, that upon the trial of the above entitled cause, at the March Term of the District Court of the

United States for the Eastern Division of the Eastern District of Missouri, on the 17th day of March, 1914, before the Honorable David P. Dyer, Judge, the following proceedings were had:

Appearances:

Barclay, Orthwein & Wallace
by Mr. Barclay for Plaintiff.

Charles A. Houts, United States Attorney,
for Defendants James J. Brougham and Arthur N. Stankey.

49 Mr. Houts: I haven't filed the answer. I desire to file the answer now. I served Judge Barclay with a copy the other day.

Mr. Barclay: No objection, Your Honor.

Mr. Barclay: We asked our learned friends on the other side to produce certain papers, documents, which might be needed at the trial, and my learned friend, Colonel Houts, says that they are here, those that we have mentioned.

Now in regard to the pleadings, Your Honor, do you desire us to read the bill?

The Court: Well, I think I know about what it is.

Mr. Barclay: I think you might save time by having the answer read, unless you have given the Judge a copy of it?

Mr. Houts: No, I haven't given the Judge a copy. The answer, if Your Honor please, is as follows:

(Mr. Houts read the answer).

Mr. Barclay: If Your Honor please, under the present new rules in equity we regard all of the affirmative matter of the answer as denied without the filing of any reply.

(Testimony for Plaintiff.)

Thereupon the plaintiff, to sustain the issues upon its part, offered and introduced evidence as follows, to-wit: The bill and exhibits thereto were read, as follows: (Hereinbefore inserted)

Mr. Barclay: I wish to offer in evidence a letter by the Commissioner of Internal Revenue of January 19th, 1904, with the heading of the Treasury Department, Office of Commissioner of Internal Revenue, to the Collector of this District.

Mr. Houts: I want to object to it on the ground that it was prior to the meat inspection act and constitutes no authority for the use of this authority.

50 The Court: I will let it go in subject to your objection. I will consider the whole case when I get the whole case in. Any objection you may make may be taken and I will rule upon it afterwards.

Mr. Barclay: It is upon the letterhead of the Treasury De-

partment, Office of Commissioner of Internal Revenue, dated Washington January 19, 1904, there are some remarks of approval. I do not need to read the remarks except to say there are some official remarks of approval. By the way it is produced by counsel for the defendant in pursuance to a notice served upon them.

Said letter offered and admitted in evidence is in words and figures as follows, towit:

51 I. R. H. Jr.

Treasury Department

Copy J. C. W.

Washington,

January 19, 1904.

Office of Commissioner of
Internal Revenue
In replying refer to.

Ben Westhus, Esq.,
Collector 1st District,
St. Louis, Mo.

Sir:

This office is in receipt of a letter from Meinecke-Blanton Manufacturing Company, manufacturers of oleomargarine, Factory No 1, 3921 Lee Ave., St. Louis, under date of the 14th inst., inclosing copy of their stencil which they use in marking their packages of oleomargarine, and stating that their attention has been called to the fact that this stencil is not [is] compliance with the Treasury Regulations governing the same.

They further state that they have been using this stencil since the commencement of their business and that it is well known to their trade and possesses some pecuniary value, aside from the cost it would incur to change the same, and contend that the fact that the letters in "Creamo" are some little larger than those in oleomargarine, does not, in any way, injure any one.

This Company submit this stencil for the consideration of this Office, and request that they be allowed to continue its use.

In reply you are advised that, as provided in the Regulations, the word oleomargarine as used in said brand, is branded or stencilled in plain Roman letters not less in size than the letters used in the manufacturers' name; that the figures describing the size of the contents of the package are not greater than one-half the size of the letters prescribed for the word "oleomargarine"; that the word "Creamo" does not appear in any wise to obscure or encroach upon the Government brands or marks, or upon the word "oleomargarine", although the letters composing the word are a little

larger than the letters used in the manufacturers' name,
52 and therefore, this Office can see no objection to its use.

Respectfully,
J. W. YERKES,
Commissioner.

Mr. Barclay: These three (letters) are to be read in conjunction. The first is a copy of a letter to Dr. Brougham, the local inspector in charge of the Bureau of Animal Industry, by Mr. Rice P. Steddom, Chief Inspection Division of the Bureau of Animal Industry. It is as follows:

United States Department of Agriculture,
Bureau of Animal Industry,
Local Office.
Washington D. C. April 4th, 1907.

Dr. J. J. Brougham,
St. Louis, Mo.

Sir:—

Referring to your letter of the 1st instant, enclosed find trade label for "Creamo-Oleomargarine" submitted for the Blanton Co. In connection therewith you are advised that the statement marked X is considered deceptive unless all the oils and fats entering the product are meat food products as provided for by the meat inspection regulations. The ingredients should also be stated on the label.

Very respectfully,
(Signed) RICE P. STEDDOM
Chief Inspection Division."

53 Mr. Barclay: That has a letterhead of the United States Department of Agriculture, Bureau of Animal Industry, Local Office. This, however, is a copy of the original. That "local office" I take it, was not on the original.

Mr. Barclay thereupon read the following letter:

"United States Department of Agriculture,
Bureau of Animal Industry,
Local Office.
St. Louis, Mo., May 24th, 1907.

The Blanton Company,
City.

Sirs:

I enclose label with copy of a letter from Chief of Inspection Division. Please note the part of the label designated as "X" must be omitted.

Very respectfully,
(Signed) JAS. J. BROUGHAM,
Vet. [Instector.]"

Mr. Barclay: Now with that is pinned this label, which I would like to have Your Honor notice a moment before I read

what follows. (Handing same to the Court). That part that is marked in the margin with an "X" is taken out in the lower panel as a part of the descriptive matter. (Indicating on paper).

The letter of which the copy was enclosed in Dr. Brougham's letter that I have just read to you is as follows:

"United States Department of Agriculture,
Bureal of Animal Industry,
Local Office.
Washington, D. C., May 22nd, 1907.

Dr. Jas. J. Brougham,
St. Louis, Mo.

Sir:

Referring to your letter of the 17th instant, enclosed find copy of trade label for oleomargarine, submitted for The Blanton Co. for approval. In connection therewith you are informed that the statement appearing thereupon with reference to inspection, and marked with an "X" is not permissible, it being covered by regulation 35 B A I 137, i. e.

"Except as provided in these regulations, no reference to United States inspection shall appear upon any meat or meat food product or the container thereof."

54

otherwise the label is approved.

Very respectfully,
(Signed) RICE P. STEDDOM,
Chief, Inspection Division"

Mr. Barclay: I now offer, Your Honor, in connection with that the paper which is pinned to that, which reads as follows:

The Court: You are reading that into the record?

Mr. Barclay: I am reading this into the record now, and the copy of which contains the trade mark is the same literally as the one that is in the bill on file, and following that in the next panel follows this language which is marked in the margin with an "X", directed thereafter to be omitted. I will read that passage "X" first:

"The United States Department of Agriculture maintain inspection in the factory of the Blanton Company. This product is passed on by a U. S. Inspector insuring absolute purity and cleanliness."

Now that is the passage that is marked with an "X".

The Court: That was stricken out?

Mr. Barclay: That was stricken out. What follows was not:

"Ingredients are Butter,—"I am reading this what follows now for another purpose and that is this (indicating label)—let me show it in a moment—later there is a formal one in

which the whole thing is approved, which omits this passage I have read and passed the inspection in a proper way.

(Resuming reading): "Ingredients are Butter, Oleo Oil, Neutral, Cream and Salt. These are churned in an abundance of richest cream, resulting in a perfect substitute for butter."

55 There is then a sentence which is partly erased, and which none of us that are concerned in the case are able to say whether the Government intended that to be erased or not. It does not appear to be in the passage marked "X", but still there is a line through it which looks as though it might be partly erased, and I will read it, notwithstanding I do not think it is material either way.

(Reading): "No coloring matter, color being derived from the cream."

That, however, I notice is kept in the formal one finally adopted.

Then follows this language:

(Reading): These goods are unexcelled for cooking and baking. Use only three-fourths as much as butter, and better results will be attained at much less cost. Try it where butter is now used, bearing in mind to use only three-fourths as much. Butter color sufficient to color the contents of this package, will be furnished free by your dealer, should you desire to color for table use." "This product is sealed immediately after churning in this air-tight, odor-proof package, protecting it from odors and other influences detrimental to purity, quality and sweetness. After opening package keep in cool, sweet place, away from fruits and vegetables and all contaminating odors."

"Approved; B.A.I." which we understand to mean Bureau of Animal Industry.

With above reference to inspection left off.

56 Mr. Barclay: We now offer the one which contains the omission—that is, after the omissions have been made. This one is approved straight, just as it is.

Mr. Houts: It seems to me there ought to be some sanction for that shown. I don't know a thing in the world about that which Judge Barclay is saying now, Your Honor. I cannot say It was not or I cannot say it was.

The Court: Show that is the label that was approved.

Mr. Barclay: That is shown it is approved.

The Court: Let it be offered for what it is worth.

Mr. Barclay: We will show that later by Mr. Blanton.

The caption of first panel—this has four panels, the first is exactly the same as the one just shown and the one that is in the bill, our bill, in this case. This has, of course, omitted entirely any reference to the inspection on this paper:

(Reading): "All oils and fats entering into manufacture of Creamo Oleomargarine are double inspected by U. S. pure food inspectors stationed in our factory, insuring absolute purity and cleanliness."

The Court: That is what was eliminated?

Mr. Barclay: This is differently stated.

Mr. Houts: There ought to be some proof.

Mr. Barclay: Of the approval?

Mr. Houts: Yes, beyond that. There is not any proof here as to the genuineness of this paper nor any dates.

Mr. Barclay: Well, we will have Mr. Blanton explain that.

DAVID A. BLANTON,

being duly sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr Barclay.

Q Please state your name? A David A. Blanton.

Q What relation have you to the plaintiff, the Blanton Manufacturing Company? A I am the president.

Q How long have you been president of that com-
57 pany? A Since its organization in 1904.

Q Are you a citizen of the State of Missouri? A I am.

Q Where were you born?

A I was born in Ashley, Pike County, Missouri.

The Court: Well, that is a good county.

Mr. Barclay: How long have you been using this mark which we call the tradename "Creamo Oleomargarine"—since what time?

A That mark was originated about 1902, when we first started in the manufacture of oleomargarine in this city in the Meinecike-Blanton Manufacturing Company.

Q That was the name of your original concern with which you were associated? A Yes, sir.

Q And your present Blanton Company was organized in 1904? A 1904.

Q Do you remember the time at which the Commissioner of Internal Revenue passed upon this trade-mark of yours—do you remember that occasion? A I do.

Q What was the title or the form in which that was submitted for approval by the Department referred to by these letters?

A That was in the form of a stencil—that was previous to the time we were putting up oleomargarine in subsidiary packages.

Q In small packages. You are the [manufacture] of oleomargarine and pay United States license, is that right?

A I do.

Q Is this a copy of the Internal Revenue license of your establishment which is displayed in the proper way at the factory?

A That is a copy like we have in our office at the present time. This copy reads 1911. The law requires us to keep that conspicuously displayed at all times. This is only a fac-simile.

The Court: There is no question about him having paid his license?

Mr. Houts: No; but I object to this as incompetent, and irrelevant, but no dispute as to the fact.

58 Mr. Barclay: At all times mentioned in this case has your factory been under the license which has been duly paid as the [manufacture] of oleomargarine? A It has.

Q The six hundred dollars a year license, is that right?

A Six hundred dollars a year.

Q Now has your establishment been inspected by the inspectors of the Internal Revenue Department of the United States during the entire period that we are speaking of?

A It has.

Q Have you as such manufacturer given the notices and the bonds and complied with the regulations that have been made for the administration of the business of oleomargarine?

A We have given a bond, we have given a notice to the Government and we have put up the signs as required by the law and regulations.

Q You filed your inventory as required?

A We filed an inventory once a year and reported monthly our sales under oath to the Government, the United States Internal Revenue Department.

Mr. Barclay: I wish, for the purpose of refreshing Your Honor's memory, to introduce in evidence the regulations regarding the labelling and branding provided by the Internal Revenue Department for manufacturers of oleomargarine as contained in regulations No. 9, revised July, 1907, of the United States Internal Revenue Department.

Regulations concerning oleomargarine; and the parts that I wish to call especially to Your Honor's attention are the regulations concerning the branding and use of ingredients contained in these regulations, including the provisions which declare that if any substances that is foreign or injurious is mixed with this product that it is subject to inspection, examination and rejection upon an inspection by this Internal Revenue Department of the United States; and that in case of dispute—Your Honor probably remembers—in case of dispute as to whether the ingredients—whether the matter intended for human consumption contains ingredients deleterious to the public health, in case of a doubt or contest the

decision of the Commissioner may be appealed from
59 to a Board composed of the Secretary of Agriculture, Surgeon-General of the Army and Surgeon-General of the Navy; and the regulations in regard to the branding, stamping and selling I offer except No. 5 on page 39, which has been [superceeded] by the sections that my learned friend has produced here.

Mr. Houts: So I won't be repeating these objections, I would like it understood that I am objecting to all of these regulations and testimony concerning the Internal Revenue Department.

The Court: I suppose you understand that objection?

Mr. Barclay: Yes.

The Court: They may be entered and they may be taken, all of them, when the case is concluded.

Mr. Barclay: This regulation No. 5—rather Section 5, under the head of "Manufacturers" on page 39 of the book that I am speaking of has been amended by a letter——

The Court: Just read in the record what you want to offer:

Mr. Barclay: I will. By a letter circular issued from the Internal Revenue Department of date February 24th, 1908, signed by John G. Capers, Commissioner, and approved by James B. Reynolds, Acting Secretary of the Treasury. And without reading all of it, I will read the amendments of that section, Section 6, Act of August 2nd, 1886, as amended, provides—then comes sections which I will not read, but I want to read the amendment to the regulation following that:

(Reading): In view of the above opinion, the provisions of regulation 9, revised July, 1907, at page 39, paragraph 2, subdivision 5—which is the matter I referred to relating to brick, prints and rolls of oleomargarine in oleomargarine are hereby amended to read as follows:

"Manufacturers are not permitted to put up oleomargarine in wooden, tin, or stone packages as subdivisions for domestic use. The use of paraffine wrappers or [cartoons] for prints or bricks to retain the flavor and form of the contents is permissible, provided such packages taken separately are not safe or suitable for transportation and are marked, stamped or branded as required by the regulations relating
60 to wrapper covering any brick, print or roll of oleomargarine.

Q Referring for a moment to this last change in the regulation, will you state in what manner the small packages contained in your larger packages manufactured for shipment and sale are now arranged—usually in accordance with that regulation? A Based on that regulation.

Q I show to you now a carton and ask you if that is the

form in which those small packages are arranged and your larger packages under this regulation? A Yes, sir.

Q Will you explain to the Court how that came to be done in the first place, how that came about—that method of treatment for your packages for the purpose of sale and what bearing it has upon the value of this trade-mark?

A Well, that regulation that you referred to there was issued at the request of my company. We found that to put out oleomargarine under the existing regulations we were precluded from carrying our products to the ultimate consumer in a way in which it would not be damaged. We found that there had been a ruling made to the effect that we could not encase it in anything that would protect it more than a paper. I went down to Washington and had a hearing before the Honorable Mr. Capers, who was then the Commissioner of Internal Revenue, and explained to him the facts, in a public hearing; and told him that we found that our product could not reach the ultimate consumer without it went in boxes or tubs, and under those conditions there was a great chance of people buying it from us in a tub and selling it for butter, and we thought if we could put it in this carton that that would obviate a great deal of fraud which is going on throughout the country in the distribution of oleomargarine.

Q Now in this form in which it is prepared are lesser packages in these large tubs contain a number of——

A Ten, twenty or thirty pounds.

61 Q The lowest limit being ten pounds. The form in which it is submitted to the trade includes the use of this trade mark, and who receives it?

A The ultimate consumer get this package just as it was.

Q What effect does that have upon the value of this trade mark which identifies this as your product?

A It makes it extremely valuable.

Q Now when you began the use of this form of sale—how long ago has that been?

A That dates from that regulation which was in 1908. Up to that time these packages were not recognized by the Internal Revenue Department. They were too strong. And the only way we could sell it up to that time was either in tubs in a very flimsy cloth or light tissue paper.

Q But the mode of selling which this regulation permitted gave you the opportunity of having the ultimate consumer know your particular brand of oleomargarine, which he knew was of a certain kind or quality, is that right?

A As packed at the factory.

Q That contains a pound (indicating carton)?

A That contains a pound.

Q You heard these letters of 1907 read regarding the

change—the slight change that was suggested by the Government. I will ask you what, if you remember, you did after that time?

A I might explain the use—the first use, instead of having the brand in that form, we took the plain carton and wrapped it in a label, we do that with certain packages today.

Q Now how was that treated?

A This [become] a part of the package by pasting it over a plain carton and making it all one sealed package; instead of this being loose on there, we take this label and paste it on.

62 Q That was the practice that prevailed before you had these particular cartons?

A That was a plain manilla carton wrapped in this label. We could not use that manilla carton previous to 1908.

Q Is this the kind that was described in that provision—paraffine regulation?

A Yes sir. And I will say, that some time before we got this ruling that we prepared these labels anticipating asking for that ruling.

The Court: You take a package or box, and this label that has just been identified you put that around the box?

A Around the box and make it a part of it, paste it solidly to the box.

Q So that this "The Blanton Company, St. Louis, Creamo Oleomargarine", would go on the box in the shape that this advertisement is now?

A Yes sir. And it is so before the consumer can get it he would have to break the seals on the box.

Mr. Barclay. You remember this date that was mentioned of the change of the regulation is the 24th of February, 1908. Now with reference to that date can you say what time it was approved, Exhibit B (indicating)?

A It was approved previous to that time.

Q It was approved previous to that time? A. Yes.

Q Have these cartons (indicating Exhibit A) in which the single pound packages have been enclosed from your factory been frequently subjected to examination by the Internal Revenue Department? A. They have.

Q No objection on their part at any time as I understand?

A No. They have a periodical inspection of all plants and [thay] take every die and every advertisement and reject them or approve them.

Q Your factory has been under close supervision of the Internal Revenue Department at all times, has it not?

A It has.

The Court: I take it that is true of all factories under the supervision of the Government inspection.

63 Mr. Barclay: We ask Your Honor's judicial notice of the fact that at the time this approval was made in 1907 there was a different administration of the Treasury Department from that which exists at the present time, and a change of administration throughout in the heads of these departments.

The Court: Yes sir.

Mr. Barclay: Now these regulations which I have mentioned contained, among others, this regulation, which is No. 4 on page 39:

"Under no circumstances will any manufacturer or dealer be permitted to impress, brand, or mark upon any print, brick or roll of oleomargarine, or on any wrapper covering the same, any device, word, or words calculated to induce the public to believe that it is a product of the dairy, or butter, even though the word "oleomargarine" appears on the same."

There are other regulations there on the subject of branding and stamping which are doubtless familiar to Your Honor and which I need not read.

The Court: I do not think I need to have the whole oleomargarine law read. Only ask him the questions as to whether this brand, which he claims is a valuable brand—whether that is a false brand; whether "Creamo Oleomargarine" is a misbranding under the statutes of the United States. As I understand the question, is where the department undertakes to change it or regulate it by saying that this brand is used or this mark is used is misleading in that way. That is all of the contention.

Mr. Barclay: Of course, we say that is so. If we were subject to the inspection of our label, the label would be valid under the regulation—the most important claim we make is that the label—that these labels are not the subject of inspection at all by the Bureau of Animal Industry, and that is because of the character of the product as I will explain in a few moments. The definition of oleomargarine is, as Your Honor knows, contained in the statute, which I need not especially read; and it is also contained in the regulations. One of our contentions is that the statute regarding the

64 Bureau of Animal Industry provides for the inspection of meat and [and] meat food products, but that oleo may or may not go in meat food products at all. It may be manufactured entirely from other products, and therefore is not within the language of the law—The Bureau of Animal Industry laws, and especially when Your Honor reads those laws and sees how far away they are from anything that might refer to the manufacture of oleomargarine. That is dealt with by a separate law. That is a matter of

argument which I will not go into now. I merely mention it so Your Honor may keep it in view in the progress of the trial.

I call Your Honor's attention to this group of correspondence: A letter of April 28th and a letter of April 26th, 1911.

Q I show you now certain originals and copies. Do you remember having received those from Dr. Brougham, the Inspector in charge, in 1911? A. I do.

Said letter of April 26th, 1911, offered and admitted in evidence is in words and figures as follows:

"United States Department of Agriculture,
Bureau of Animal Industry,
Local Office.
Washington, D. C., April 26th 1911.

Dr. J. J. Brougham,
St. Louis, Mo.

Sir:

Referring to your letter of the 20th instant, with respect to the enclosed wrapper for "Creamo Oleomargarine" submitted for Est. 668, you are advised that the statement "The goods herein contained are churned in the most complete and sanitary plant in the world" is not approved and should therefore be omitted from the wrapper.

Very respectfully,
(Signed) RICE P. STEDDOM,
Chief, Inspection Division."

Said letter of April 28th 1911, offered and admitted in evidence is in words and figures as follows:

65 "United States Department of Agriculture,
Bureau of Animal Industry,
Local Office.
924 Chemical Bldg.
St. Louis, Mo., April 28th, 1911.

The Blanton Co.,
Gentlemen:

Referring to enclosed trade label submitted for approval to our Washington office, returned with the instructions that the statement "The goods herein contained are churned in the most complete and sanitary plant in the world" must be omitted.

See enclosed copy of letter signed by Rice P. Steddom, Chief Inspection Division.

Very respectfully,
(Signed) JAS. J. BROUGHAM
Inspector in Charge."

Q Were these enclosed with this letter which came back to you from the Department (Indicating)?

A This was enclosed with that.

Q Were the others enclosed (indicating)?

A This was enclosed with that referring to label attached to letter).

Q This letter of date 26th of April, 1911, to Dr. Brougham by Mr. Steddom, Chief, Inspection Division, I understand you say this exhibit accompanied this letter?

A Yes sir and sent us a sample.

Q Exhibit C was attached to and enclosed with this letter of the 26th of April, is that right? A Yes sir.

Mr. Barclay: We offer this in evidence, Your Honor.

Said paper marked Exhibit C is offered and admitted in evidence in words and figures as follows, to-wit:

Blanton. Quality.
B
Quality. Blanton.
The Blanton Co., St. Louis, U. S. A.

66

Creamo
Oleomargarine

The goods herein contained are churned in the most complete and sanitary plant in the world. Every process is scrupulously guarded to produce a product both pure and perfect. Being richer in butter fats use only three-fourths as much in cooking and baking as butter.

U. S. Inspected and Passed
Estb. No. 668.

Mr. Barclay: "The Blanton Company, St. Louis, U. S. A." Your Honor had better look at that. (Hands same to the Court). Your Honor will notice this contains on the second panel "Creamo Oleomargarine", and in the third panel "The goods herein contained are churned in the most complete and sanitary plant in the world. Every process is scrupulously guarded to produce a product both pure and perfect. Being rich in butter fats use only three-fourths as much in cooking and baking as butter.

U. S. Inspected and passed Estb. No. 668."

Now this is the letter from the Chief of the Inspection Division, Rice P. Steddom, to Dr. Brougham regarding this wrapper. It is April 26th, 1911:

"Referring to your letter of the 20th instant, with respect to the enclosed wrapper for "Creamo Oleomargarine" sub-

mitted for Est. 668, you are advised that the statement "The goods herein contained are churned in the most complete and sanitary plant in the world" is not approved and should therefore be omitted from the wrapper.

Very respectfully,
(Signed) RICE P. STEDDOM,
Chief, Inspection Division."

Q This other letter, Exhibit D, has that objectionable language underscored in blue pencil? A Yes sir.

67 The Court: After you received that letter then you omitted it?

Mr. Barclay: Oh yes.

The Court: You excluded that part of it and left the other on?

Mr. Barclay: Yes sir.

Mr. Barclay: Now in everyone of those cases where the Government objected to those mentioned in the particulars described, your advertisements and these papers conform to that from that time on? A Yes sir.

Q As near as possible? A Always.

Mr. Barclay: Now this is a letter to the Blanton Company of April 28th, 1911 by Dr. Brougham, the Inspector in Charge here in St. Louis:

"Referring to enclosed trade label submitted for approval to our Washington office, returned with the instructions that the statement "The [good] herein contained are churned in the most complete and sanitary plant in the world" must be omitted.

"See enclosed copy of letter signed by Rice P. Steddom, Chief Inspection Division.

Very respectfully,
(Signed) JAS. J. BROUGHAM
Inspector in Charge."

The Court: He complied with what they required?

Mr. Barclay: He complied entirely.

Now I want to go back a moment. After these directions by the Commissioner of Internal Revenue and by the Bureau of Animal Industry in the form that has been mentioned in 1907, how extensive did you attempt to extend the use of this trade-mark? What did you do towards extending its value by use? Just tell the Court and the gentlemen.

68 A Subsequent to the decision by the Internal Revenue Department to the effect that we could put up our goods under a carton, we centered our whole sales organization upon establishing our Creamo carton goods throughout this country. We have sold those goods from Boston to California. We have even sold out of Boston by our agents there up into

Maine and we have shipped them as far as the City of Mexico, exported them.

Q I will ask if your customers who have been mostly dealers in many cases, if they have frequently used your product under the name of "Creamo Oleomargarine" as leading elements in their trade?

A That is the only brand that we advertise and that is the only brand that we contract with our dealers to advertise for them; and the contracts are based upon Creamo Oleomargarine in cartons.

Q Just tell the Court what steps you have taken in your business organization for the advertising of this particular brand of Creamo Oleomargarine? What have you done towards extending the knowledge and publicity of that brand to the public?

A We have found that the best advertising is personal solicitation through women demonstrators, who take those goods and go from house to house and explain to the woman of the house how she can save money by using a substitute for butter, which will cost approximately half; and we impress upon the women these goods in this carton are absolutely sanitary, that they are inspected by the Government and that they should insist always to ask for Creamo Oleomargarine. That is the basis of our whole business.

Q Now between the time from the start of the use of this label and this brand of Creamo Oleomargarine up to 1911, to what extent had your trade increased in that particular?

A Well, I would say that it increased five hundred per cent. We had a very hard time starting under the old regime of tubs. I would say we put out a great deal in tubs under a stencil, but we hold that subsidiary to our carton goods. We are trying to get the carton goods to lead, and would rather sell one carton than five pounds of tub goods, because we want

69 the value that attaches to the brand to get to the women so they ask for our goods, and we can sell them on a basis that precludes competition to a certain extent.

Q Has this trade-mark acquired a value during these years in building up the business here you have described?

A Yes sir.

The Court: How long have you used this particular brand before you had notice to quit it? A About five years.

Q And that has continued in use?

A No, I made a mistake; five years in the cartons, but in 1904 to 1912 would be eight years.

Mr. Barclay: Eight years.

The Court: Were you using it when this notice was given you? A Yes sir.

Q How long before that? A Eight years.

Q In continuous use?

A The Blanton Company and I used it continuously with the Blanton Manufacturing Company—Blanton Manufacturing company has used it for eight years.

Q I will ask you this question: After all these corrections were made, and after you say you have conformed your actions to what the department required, how long did you continue to use that?

A Well, that question isn't susceptible of answering it because they would correct it from time to time and we were using it under corrections the department made.

Mr. Barclay: But no correction as I understand it, until these recently, within the last year, no correction applied to the use of Creamo Oleomargarine at all.?

A Absolutely none at all. But for instance that "Creamo" where they say we have to take that out, or go ahead and use the label with the Creamo left off, that doesn't apply to the panel we are now discussing.

70 Q These corrections occurred from time to time. The panel which was the original subject of approval never was criticized until very recently, is that right? A Never was.

Q Now can you state approximately how much of an expenditure you have made in the effort to enlarge and extend the publicity of this particular trade-mark which we call "Creamo Oleomargarine"?

A I can state the figures last year, and I can give you an approximation of the last ten years.

Q Well, that is what I wanted, as nearly as you can?

A We figure that it was over ten thousand dollars in the last year in publicity and advertising and the exploiting of this label—ten thousand dollars last year, and I would say that it goes back probably to smaller amounts, but it will probably average seventy-five hundred dollars for ten years.

Q You mean seventy-five hundred dollars a year?

A Yes—that is, including the men that we paid to do that and the women that we had.

Q Now do you have a department in your business which deals with this matter of publicity of this particular trade mark? A We do.

Q And is this the only one that you have advertised and exploited?

A We advertise none but the one brand; we have centered [out] whole force on this one brand.

Now at 12:30 P. M. a recess is declared until two P. M. of this day, at which time the following proceedings were had:

71 DAVID A. BLANTON,

in continuation of his testimony, testified further as follows:

Mr. Barclay: In exploiting this trade-mark, which is the subject of this suit, you have a department in your business in which that matter is confined, the publicity of the trade-mark? A Our advertising department.

Q What do you call it? A Our advertising department.

Q What has been best for recent years—for many years back, in promoting your business?

A Our Creamo Oleomargarine.

Q And I believe that you said that the average of the expense of that trade-mark during the last ten years—what would that be?

A I approximated it based on what it was last year. Last year the figures showed approximately ten thousand dollars. Now we have done more advertising. As the business grew we would do more advertising, and I would say there would be probably an average of seventy-five hundred dollars a year. That includes, of course, pay to demonstrators who go out and sell the goods, and who also demonstrate the article as I mentioned before. It is not what you would call newspaper advertising or bill boards or anything like that, but our publicity exploiting of that brand.

Q Now this product has never been sold as I understand from you other than by the name of oleomargarine attached to it—never has been sold otherwise?

A Never; it would be impossible under the Internal Revenue.

Q I understand; but as a matter of fact "oleomargarine" has always been upon these packages—large or small they were associated with the word "Creamo", is that right?

A The word "oleomargarine" must be on every package, and we are allowed a descriptive word by the United States Department of [Interior] Revenue in connection with the word "oleomargarine".

72 Q During all of this period that I speak of there has been no objection made whatever by the Internal Revenue Department to the use of the mode in which you have adopted for selling these goods? A None whatever.

Q Is the word "Creamo" in any dictionary or is it an arbitrary word you chose for that purpose?

A It is an arbitrary word, absolutely coined word.

Q It is not in the dictionary at all? A It is not.

Q What we have been dealing with so far in the matter of labels since the year 1908, when it was permitted to sub-

divide in the way you have described, has been one pound packages; did you afterwards submit to the Department a label of oleomargarine for the larger packages, two, three and five pounds? A I did.

Q And was that approved? A It was.

Q I show you Exhibit E, which was the [cartoon], as I understand, submitted for the larger packages?

A The larger packages are covered by a label as described this morning. This wrapper covers the two, three and five pound packages.

Q How were the two, three and five package sub-divisions put in your packages? A It is pasted to the carton.

Q Was this the letter received from the Department after having submitted that for examination?

A This was the letter.

Q That contains the name—the description of the number of pounds in the [cartoon]? A That was two pounds.

Q Were the larger ones for three and five the same as that for those number of pounds? A Same panel, same printing.

Q Same panel and same printing as all packages?

A Yes that was sent to the Department for getting the approval for printing and different subdivisions.

Q This Dr. Brougham calls our attention to the fact that this does not bear the stamp of approval there?

A We have a copy for that.

Q The same as this in all respects?

A It is a typewritten copy from which that label was made.

73 Q I see.

A We will put the original in which is the proper one after all.

Q This was the original you have here, and the other one was a copy taken from it afterwards, for use, is that right?

A Better let me explain.

Q Yes.

A I will say from time to time that these labels were approved, and then for some reason or other it became necessary—for instance, it became necessary in sending goods into New York—the New York State laws prohibit the giving away coloring for family use, and it became necessary at one time to change a panel on this "Creamo" label; and that was sent down and corrected, and it was re-approved with that correction; and I cannot say that this is the original caption of our Creamo label that is there, but I will say that this was sent down probably as a correction, which was approved, and it may and it may not be like that label. But if that label is in use it has been approved by the Government.

Mr. Houts: I object to that as a mere inference. I object to that and move that it be stricken out.

The Witness: I will say that that has been approved. May I say that?

Mr. Houts: I object to that. There is a way of proving that and that is by a letter.

The Court: Have you used any that has not been approved?

A Never; it would be impossible.

Mr. Houts: I object to that as a matter of opinion.

The Court: In all these matters that we have now did the Government approve them? A They did.

Mr. Houts: Well, I think the Government's approval has been by a document of some kind, and the best evidence would be by the production of that document. I object to his opinion that it was approved.

Mr. Barclay: This letter may throw some light on it. The letter is dated July 8th, 1912. Headed "United States Department of Agriculture, Bureau of Animal Industry, Local
74 Office. The Blanton Company, 115 Spruce Street, St. Louis, Missouri; Gentlemen: Enclosed find "Creamo Oleomargarine" Trade Label which has been approved by the Washington office. Very respectfully, James J. Brougham, Inspector in Charge. P. S. When the original Trade Label is finished, please send three copies to this office. J. J. B."

Q Please explain what is meant by that, so the Court will examine that? A That is the approval.

Mr. Houts: I object. Let him produce what accompanied that letter.

The Witness: Here is what accompanied that, was approved July 5th, and this was two days afterwards, on July 8th.

Mr. Barclay: The Court must infer the approval by the Bureau on the 6th of July, 1912, by the letter which he gets from the St. Louis office dated July 8th, 1912, enclosing the trade label which has been approved. I thought when I spoke of this that this was the original one; it seems it is not.

The Court: Well, have you got the trade label which that letter approves? A Yes sir.

Q Where is it?

A Here is the rough typewritten copy. Here is the copy of that previous label attached to that letter.

Q Now up to that time that I speak of—this letter which is July 8th, 1912, up to that time had there been any objection whatever by the Bureau of Animal Industry towards the use of the Creamo Oleomargarine as a trade mark?

A None that we ever were advised of.

Q And in the meantime what other measures had you taken besides the advertisements and the extension of your business intended to be accomplished by that—what other

steps had you taken towards selling the exclusive right to the use of this trade mark?

A We had the word "creamo" registered in the United States Patent Office as a proper word to use in connection with the use of oleomargarine.

75 Mr. Barclay: I want to offer the registration of this trade-mark for oleomargarine, passed by the Patent Office after a very considerable deliberation, the application being made in January, the 6th, 1908, the registration being allowed on the 9th of June, 1908. The registration of this was a trade mark under the United States laws concerning trade marks—

Mr. Houts: I want to object to the introduction of it on the ground that it has no bearing upon the questions involved here, and could confer no authority for the use of this label under the regulations and the laws governing meat inspection.

The Court: Let it go in subject to the objection. Said registration of trade-mark offered and admitted in evidence is in words and figures as follows, to-wit: "No. 69352

The United States of America

To all to whom these presents shall come:

This is to Certify, That by the records of the United States Patent Office it appears that the Blanton Manufacturing Company, of St. Louis, Missouri, a corporation organized under the laws of the State of Missouri, did, on the 6th day of January, 1908, duly file in said Office an application for registration of a certain

Trade-mark

for Oleomargarin,

that it duly filed therewith a drawing of the said trade-mark a statement relating thereto, and a written declaration, duly verified, copies of which are hereto annexed, and has duly complied with the requirements of the law in such case made and provided, and with the regulations prescribed by the Commissioner of Patents.

And, upon due examination thereof, it appearing that
76 the said applicant is entitled to registration of its said trade-mark under the law, the said trade-mark has been duly registered to The Blanton Manufacturing Company, and its successors or assigns, in the United States Patent Office, this 9th day of June, 1908.

This certificate shall remain in force for twenty years, unless sooner terminated by law.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the city of Washington, this ninth day of June in the year of our Lord

one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty-second.

(Seal). (Signed) C. C. BILLINGS
Acting Commissioner of Patents."

"Trade-mark.

No. 69,352. Registered June 9, 1908.

The Blanton Manufacturing Company.

Oleomargarin.

Application filed Jan. 6, 1908.

Creamo

THE BLANTON MANUFACTURING COMPANY
Proprietor.

By FREDERIC A. SOUTHWICK
Attorney"

77 "United States Patent Office.

The Blanton Manufacturing Company of St. Louis, Missouri.

Trade-Mark for Oleomargarin.

No. 69,352. Statement and Declaration. Registered June 9, 1908. Application filed January 6, 1908. Serial No. 32,100.

Statement.

To All Whom It May Concern:

Be it known that The Blanton Manufacturing Company, a corporation duly organized under the laws of the State of Missouri, and located in the city of St. Louis, in said State of Missouri, and doing business at No. 115 to 123 Spruce Street, in the city of St. Louis, State of Missouri, had adopted and used the trade-mark shown in the accompanying drawing, for oleomargarin, in Class 46, Foods and ingredients of [foods].

The trade-mark has been continuously used in the business of said corporation since January 1st, 1905.

The trade-mark is applied or affixed to the goods, or to the packages, containing the same, by placing thereon a printed label on which the trade-mark is shown.

THE BLANTON MANUFACTURING COMPANY,
DAVID A. BLANTON, President.

Declaration.

State of Missouri, City of St. Louis, SS:

David A. Blanton, being duly sworn, deposes and says
78 that he is the president of the corporation, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said

trade-mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade-mark is used by said corporation in commerce among the several States of the United States; that the drawing presented truly represents the trade-mark sought to be registered; and that the specimens show the trade-mark as actually used upon the goods.

DAVID A. BLANTON.

Subscribed and sworn to before me, a notary public, this 2nd day of January 1908.

(L. S.) THOMAS RIELLEY,
Notary Public."

79 Mr. Barclay: How extensive has been the advertisement of this Creamo Oleomargarine trade-mark and articles sold under it provided it can be used as you described up to 1911? How extensive has that been advertised among your trade customers? I will show you this memorandum which may refresh your memory as to the mode in which has been done. Just tell the Court.

A In making contracts with our dealers we impress upon them the importance of advertising "Creamo Oleomargarine"; especially is this found to be desirable in states where there is no coloring allowed in oleomargarine—that is, if the consumer must color their own goods; especially is this true in New York, Pennsylvania and Iowa. In those states we have gone, and centralized our advertising campaign in those states. We have a wholesale dealer in the City of Des Moines, Iowa, who has advertised quite extensively in the papers in the State of Iowa, and quite extensively in the street cars. Every interurban car running in the City of Des Moines has carried, "Creamo Oleomargarine", "Creamo Butterine" advertising for a period of one year. In the City of Philadelphia we have a wholesale dealer who has something like five hundred retail dealers who sell our "Creamo Oleomargarine", and probably sell it exclusively; and they in turn are allowed a certain amount if they will advertise our goods; and they have advertised it quite extensively in that district. The same is also true of Lancaster, Pennsylvania, Johnstown, Pennsylvania, Altoona, Pennsylvania; and we have a factory branch in the City of Pittsburgh which covers two hundred towns contiguous in surrounding territory. Our policy in that market is to advertise, as

80 in other parts of Pennsylvania, because we find that people respond very readily to this advertisement, on account of the peculiar state laws which seek to have oleomargarine delivered in subsidiary packages. The same is also true of Iowa, where we have gone in quite extensively;

and New York has a peculiar state law that requires all oleomargarine to be done up in sealed packages; and our largest business is probably in the State of New York following that law. In New York City we have a factory representative.

Q Now all of these packages you speak of bear this brand?

A "Creamo Oleomargarine".

Q Now to an approximate degree what has been the extent of your business for several years past before this trouble began?

A Well, the business is growing; for the past year we did approximately nearly five hundred thousand dollars.

Q How much of that is attributable to the oleomargarine that you sell?

A Well, I would say probably, including the tubs, which are stenciled Creamo Oleomargarine—I would say two-thirds of that is Creamo Oleomargarine. Then we have a baker goods which we have put upon the market under Creamo Pastry, especially for pastry making, and Creamo Cake, especially for cake bakers. We have very large business on that in New York—that is, in the bakers line.

Q From your experience and knowledge of the business as a manufacturer, what would be the effect of changing this label, the one that is mentioned in the bill, in any substantial respect?

A Well, just simply be a slow death to the business.

Q Suppose that you were compelled to put the word "Creamo Brand" instead of "Creamo Oleomargarine" as it is now done upon these packages?

A Well, it would be a physical impossibility to put it upon the one pound package like that there, and it would wipe out the identity of the package.

81 Q Would it be physically possible to put on a carton like this with the words "Creamo Brand" without destroying the integrity of the brand as it is?

A You could not put "Creamo Brand" in the same type as the word "Creamo" is there; and also the word "Oleomargarine" in the same size type and get it on, it would be impossible; to make it any smaller would be to wipe out the original carton altogether.

Q Apart from those difficulties, what would be the effect as a matter of business in making a substantial change in an established trade-mark?

A Well, that would just do away with the brand altogether and start over on another word; we should have to take up the word and do all this work over and repopularize this thing.

Q Would this change that has been proposed and suggested in the mode of putting up these packages and the use of this

trade-mark—what effect would that have on the business you have built up? A It would wipe it out.

Q What, in your opinion, is the value of this trade-mark in the way in which you have been in the habit of using it in your business?

A I could not put any value that would be—it is only valuable to us; it would not be of any value to anybody else; I could not say—I will say this: That it certainly ought to be worth as much as we have spent on it. I could not duplicate it for any less.

Q Now when the questions first came up, after the dates which I have mentioned in which the department began to make claim upon you to make a change in this form, did you visit Washington and have an interview with the department officers there on this subject?

A Well, I submitted a written argument in our behalf before I visited Washington.

82 Q Did you have a hearing in 1903, in April, 1903, before the Department in Washington? A Not 1903.

Q I mean 1913? A Yes 1913.

Q Did you submit some suggestions to the department at that time? A I did.

Q Before whom was this hearing had that you speak of?

A I think the first hearing was before Dr. Melvin.

Q He is the head of the Bureau of Animal Industry, is he not? A Yes sir.

Q And then there was also a hearing— A The Honorable Solicitor.

Q His name is Coffey? A Coffey.

Q Was it before Mr. Coffey that you submitted this summary?

A The last summary was submitted to the Solicitor, and prepared for the Chief of the Bureau, who suggested it be heard by Mr. Coffey, as a matter of law he said, and he would rather have Mr. Coffey read it.

Q Have you always objected to the efforts of the Department to change your trade label "Creamo [Oleomrgarine]"

A I have always objected very strenuously.

Mr. Barclay: We would like to have before the Court his objections to the changes in the use of the word "Creamo" and the notice that he had received that its use must be discontinued.

Q Before that they had notified you that this had to be discontinued and gave you a time in which it was to be done?

83 A That is the last paper. The first paper is the important one. There was quite a discussion taking place, I would say twelve or fifteen months, and this was the important hearing, and the final paper was submitted to Mr.

Coffey in April of last year, about eleven months ago. Mr. Coffey had this under consideration about four or five months, and then we were told that if we would change our formula and make certain changes, which we figured we could not make, it would be passed; and we told him that we could not accept it.

Mr. Barclay: I want to offer in evidence a letter of the 25th of April, 1913, Exhibit I. This is a letter dated April 26th, 1913, to the Blanton Company, 115 Spruce Street, St. Louis, Missouri, and is as follows:

"April 26, 1913.

The Blanton Company,
115 Spruce Street,
St. Louis, Mo.

Gentlemen:

Referring to your letter of the 24th instant, relative to the use at Est. 668 of labels, etc., in connection with oleomargarine, bearing the word "creamo", you are advised that the use of labels of this character, which have been formerly approved, may be permitted, pending the ruling of the Solicitor of the Department on the subject. A copy of this letter is today being forwarded to Bureau Inspector in Charge, St. Louis, Mo., with instructions that he be [goberned] accordingly.

Very respectfully,

CHIEF, MEAT INSPECTION BUREAU"

84 Mr. Barclay: And this one of October 2nd, 1912, we offer in evidence. This is October 2nd, 1912, from Melvin, the Chief of Bureau of Animal Industry to the Blanton Company.

Said letter is marked Plaintiff's Exhibit J for identification and is in words and figures as follows, to-wit:

"October 2, 1912.

The Blanton Company,
115 Spruce Street,
St. Louis, Mo.

Gentlemen:

The Bureau is in receipt of your letter of August 15th and the statements contained therein have been carefully noted. It is believed that there is no authority in the meat inspection law or regulations for the use of names such as "Creamo", "Clovercreme", "Fulcreme", and "Extracreme", in connection with oleomargarine.

The meat inspection law provides that no meat or meat food product shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under

any false or deceptive name. The use of the names above specified is considered deceptive and misleading and the Bureau must therefore decline to continue permitting these names to be used in connection with oleomargarine. However, since the Bureau's approval was formerly given, reasonable time will be allowed your company in which to use the cartons, wrappers, etc., bearing these objectionable names, but you are requested to immediately submit to this office a statement showing the number of such cartons, wrap-
85 pers, etc., on hand and the length of time it would take to exhaust them.

Very respectfully,

CHIEF OF BUREAU".

The Court: I understand the answer to that letter to admit that permission was given to use the labels that were on hand at that time, when they were sought to be accepted—that is what I understood from the answer?

Mr. Barclay: Yes.

Mr. Houts: Yes.

Mr. Barclay: Well, on that latter proposition about which there is no dispute, as I understand it—

The Court: ,Sir?

Mr. Barclay: I say I think there is no dispute on that proposition. It might perhaps be well to introduce in evidence, however, the letters which were marked as Exhibits in the bill. One of them has been put in, and the other one we will put in now.

Said letter is marked Plaintiff's Exhibit K for identification, offered and admitted in evidence is in words and figures as follows:

86 "United States Department of Agriculture.
Bureau of Animal Industry,
Local Office.
924 Chemical Bldg.,

St. Louis, Mo., February 10th, 1914.

Judge Shepard Barclay,
Rooms 311-312,
Commercial Bldg., City.

Dear Sir:

Referring to your letter of February 9th, relative to a copy of a letter to The Blanton Co. on the subject of a trade label "Creamo". You are advised that if I do not receive instructions to the contrary between this date and March 1st, on and after that date, the use of that label will not be allowed. I can not state whether further consideration of this subject would be given by our Bureau if requested; however this

subject has been under consideration for some time and I suppose has been referred to our legal department for advice.

Very respectfully:

(Signed) JAS. J. BROUGHAM
Inspector in Charge."

87 The Court: Those are exhibits attached to the bill?

Mr. Barclay: They are; yes sir.

The Court: A part of the bill?

Mr. Barclay: Yes sir: Just consider them in.

Q Has there been an inspector of the Animal Industry in your establishment for a long time?

A There has been an inspector in there ever since the law went in force.

Q What is that gentleman's name?

A The present inspector?

Q Yes. A A. N. [Sankey.]

Q Your establishment is located in what part of the city?

A Second and Spruce Streets.

Q Tell the Court what sort of an establishment it is. What are your methods of doing business and what is the nature of the material you use for this particular brand of oleomargarine?

A We occupy a building with one hundred and fifty-two feet front by seventy-five feet deep, part of it is a ware house, and part of it is an eight story re inforced steel concrete building. The equipment consists of churns, vats and things —an equipment that is usual to a high grade oleomargarine factory; and the materials we use are all bought subject to the inspection of the Government.

The Court: I do not understand that there is any question raised in these pleadings about how this oleomargarine factory is run, is there?

Mr. Barclay: Except that it is intimated that the purpose of the brand is misleading and, of course, we want to show that the matter is conducted according to the best methods that he knows from a business point of view to carry on this trade.

88 The Court: I do not want to keep anything out of the record that you think ought to be in the record, but at the same time there is no question raised here, as I understand it, that this factory was not carried on as well as could be carried on practically and that the material used is the same kind of material that is used in all oleomargarine factories.

Mr. Houts: The answer is specific. We say that the use of that word is designed to induce people to think that there was a sufficient amount of cream in it. That is sufficient. So we don't say anything about how their factories run; no issue as to that; no contention about it.

Mr. Barclay: Tell the court about that (handing witness carton marked Exhibit L)?

A This carton has been the subject of approval, the same panel exactly as the one which we are trying to sustain. One of these panels was subject to revision on account of the change in the New York, and this came back after some corrections and suggestions on the part of the Department—it came back re-approved again.

Q Now when was that, how far back was that?

A February 27th, 1912.

Q Have you got one of those here? A Yes sir.

Mr. Barclay: We ask to have this marked as Exhibit L. and offer it in evidence.

Said [cartoon] marked Plaintiff's Exhibit L for identification, offered and admitted in evidence, is in words and figures as follows, to-wit:

89

Blanton. Quality.
B.
Quality. Blanton.
The Blanton Co. St. Louis
Creamo
Oleomargarine

Not made in a packing-house but in a special plant designed and completely equipped with every-modern appliance for producing high grade goods. Rigid inspection, and the most perfect scientific sanitary measures are observed by us at every step. The result is a product combining absolute purity and perfect uniformity.

This product is sealed immediately after churning in this air-tight, odor-proof package, protecting it from odors and other influences detrimental to purity, quality and sweetness. After opening package keep in cool, sweet place, away from fruits and vegetables and all contaminating odors.

U. S. Inspected and passed under the Act of Congress, June 30, 1906. Establishment No. 668.

Admirably adapted to table use because of absolute purity and strict uniformity. Better than ordinary butter for cooking and baking, and effects a large saving in cost. Makes a

delicious cake, and delicate, crisp pastry. Ten to twelve ounces does the work of a pound of butter.

—Not Made in a Packing House—
90 Blanton. Quality.
B.
Quality. Blanton.
—The Blanton Company, St. Louis—"

Mr. Barclay: When the inspector of the Animal Industry began to work as such in your establishment did you make any objection to his so doing; if so, what, substantially, did you say on that point?

A We protested, that under the advice of our attorney, that oleomargarine was not a meat food product and, therefore, we were not subject to the meat inspection law.

Q What did they say about that? What happened?

A They said it would be necessary for us to have the inspection or our shipments interstate that would be stopped; that we would not be allowed to ship interstate.

Q What would be the effect of the refusal of the Department to permit you to use this label upon your business?

A What would be the effect?

Q What would be the effect upon your business if you were excluded from using this trade label as heretofore?

A Well, it would be very disastrous, both from a financial standpoint—

Q Yes. A It would be very disastrous.

Q It would represent a large pecuniary loss to your establishment? A It would.

Mr. Barclay: Now you may take the witness.

Cross Examination by Mr. Houts.

Q Mr. Blanton, this oleomargarine that you sell under this label "Creamo", does that contain any oleo or oleomargarine oil? A Does it contain at the present time?

Q Yes; what you have been selling under that brand.

91 Creamo brand? A It contains oleo oil.

Q In any considerable quantity?

A Well, it varies—a very considerable quantity.

Q A very considerable quantity?

A A very considerable quantity at present.

Q Does it contain neutral lard? A Yes.

Q What is neutral lard?

A Neutral lard is a lard produced from the leaf of a pig neutralized so as to take the taste and smell out of it.

Q Now as I understand you you say you have been using

this brand—"Creamo Brand", or "Creamo Oleomargarine", that label, for ten years? A Not that label; the stencil.

Q I mean that as a trade mark you have been using it for ten years? A For ten years.

Q You were then using that prior to the passage of the Pure Food Law and also prior to the Meat Inspection Law? A Yes sir.

Q Now, after the passage of the Meat Inspection Law did the Secretary of Agriculture take up with you the use of that name "Creamo Oleomargarine", didn't he? That was the subject of the correspondence between you and the Department? A Yes sir.

Q Now you have introduced in evidence a letter of July 6th, I believe it was 1912, in which you were notified of the approval of a label that had been submitted—"Creamo Oleomargarine"—that was July 6th, 1912?

A That is that typewritten?

Q. Yes. Now on August 8th, immediately following that, you received a letter in which the Department told you
92 that they had come to the conclusion that the use of that trade mark conveyed a false inference to the consuming public and that it should not be used in oleomargarine, didn't you? A That was our first notification.

Q The letter was dated August 8th, 1912?

A That is my recollection.

Q Now, without reading all of these letters that passed between you and the Department, after that time the subject of the use of that label was taken up and discussed either by letter or by personal talks between you and the department, that is true, isn't it? A That is true.

Q And they permitted you then to use up the labels that you had on hand? They issued orders to that effect, did they not, and advised you of that fact? A Oh, yes.

Q And the Department suggested [then] changes, did it not, that should be made in your label? A One change.

Q Well, they suggested, did they not, that the word "Brand" be used so that the three words "Creamo Brand Oleomargarine"—you could use that they said?

A In as prominent a type—all should be displayed alike.

Q Yes, those three words should be displayed alike. That was conditioned, was it not, upon your using at least ten per cent of cream? A They held that.

Q In your product?

A They held that I must use cream in the product.

Q To the extent of ten per cent? A Yes I believe so.

Q And the ruling of the Secretary of Agriculture was that if you used ten per cent of cream you then could use the words "Creamo Brand Oleomargarine" as a label, isn't that correct?

93 A Provided we would allow them to write that label the way they wanted us to.

Q Well, the only restriction they placed upon it was that each word should be given the same prominence, isn't that correct? A In the same type, yes.

Q Now you say that the addition of that word "brand" destroyed the value of the label? A Absolutely.

Q What is the reason of that?

A That is a great long trade story, and you could not appreciate the hardness or the difficulty in the placing of a well liked and popular brand before the public to put the "Brand" there; to my mind I think it would eventually result in the public's mind to make that label appear foolish.

Q Let me ask you: Didn't you contend before the department that the words "Creamo Oleomargarine" were nothing but a business label? A Absolutely.

Q And you contended, did you not, that it did not indicate to the purchasing public the constituents of your oleomargarine? A I did.

Q You did contend that? A Yes.

Q. And you contended, did you not, that the use of those two words was only of value as trade label or trade name?

A I didn't contend that, no; my contention has always been that oleomargarine is the name of the product.

Q Yes.

A And that, according to the United States Internal Revenue laws, we are allowed the privilege of putting some arbitrary word on our oleomargarine which will separate it and distinguish it from other grades of oleomargarine on the market, and that as long as we had the word "oleomargarine" on the product we had complied both with the meat inspection law and also the Internal Revenue law, which we had gone to the trouble of getting their approval in the use of this word.

94 Q Well, you contended, did you not, that word "Creamo" simply signified a brand?

A We contend that the word "Creamo" is an arbitrary coined word which meant nothing but a distinguishing mark to distinguish our goods from the other goods on the market.

Q Well, now isn't that the definition of the word "brand" isn't that the definition of it?

A Well, now that comes pretty close but you don't cover it all.

Q You know of a great many brand goods of some of these houses? A Oh, yes.

Q The "Buffalo Brand" gotten out by Scudder-Gale Grocer Company?

A Yes, but you don't catch my point; that I claim if the peo-

ple who popularized "Uneeda Biscuit" put "Uneeda Brand Biscuit"—and by the way biscuit is not the real name of the product contained in the box—if they were forced to do that they could not have popularized that label before the public like they have, for they would have had to carry such a load they would have had to give it up.

Q It would not change the meaning of the expression?

A Absolutely not, but it makes the label appear foolish. It has been very aptly said that to put the word "brand" any where on a label is like branding the word "cow" on a beautiful pastoral scene—we have a cow by putting the word "cow" underneath the picture of a cow.

Q You know, as a matter of fact, that practically all of these people in the grocery business used the word "brand" in connection with every brand, as "Buffalo Brand"?

A Never heard of that. If that is the fact why don't Ivory soap people put "Ivory Brand Soap", why don't Uneeda Biscuit put "Uneeda Brand Biscuit".

95 Q I am asking you what you know as a matter of fact—

A As a matter of fact I know from a merchandise standpoint that it is absolutely impossible—that is, my knowledge from a merchandising standpoint and a manufacturer—it would be absolutely impossible.

Q Now in selecting the word "Creamo", what was your purpose in choosing or coining that word?

A My purpose, at that time the oleomargarine industry was in its infancy. The butter interests were circulating stories to the effect that oleomargarine was produced from sewerage and dead horses. We found it necessary to do something to combat that belief and to convey to the women what the goods were we have; we must have a term that while not descriptive was suggestive.

Q Suggestive of what?

A Suggestive of cream. At that time we were using thirty per cent of cream in those goods, and we wanted to suggest the fact that this was not a dead horse but was a cream product.

Q And that has been the purpose ever since, hasn't it?

A Absolutely, ever since.

Q Now you have said that it absolutely would destroy the value of the label if the word "brand" was put there?

A Absolutely you could not merchandise it; you could not popularize it at all; it would kill it.

Q Now didn't you submit to the Department a number of labels with the word "Brand" upon them? A I did.

Q I will hand you— A Did it under protest.

96 Q Now I hand you what has been marked Defendant's

Exhibit 1, and ask you if that was not one of the labels that you submitted as a substitute for the labels which the Department objected to?

A I submitted that as a specimen to the Solicitors as one we were submitting to our dealers; if they thought we could keep our contracts and furnish them these goods without [loosing] its identity we would try it out.

Q Didn't you ask the approval of the Department of that label?

A We did; had to have the approval before we could put it on our goods.

Q I show you defendant's Exhibit 2. Didn't you likewise submit that?

A When we submitted this one we submitted four with the explanation that we wanted to submit these to our trade—the men we had contracts with—looking to maintain the integrity of this label; that we wanted to submit them to our trade to find out if we could still maintain our contracts with them and get by—did that later.

Q Did you submit these in letters?

A No; that was submitted in person to the Solicitor.

Q Didn't you send those by letters to the Chief of the Bureau of Animal Industry—with a letter in connection with them?

A Subsequently; but I understood you meant first, if that was submitted first.

The Court: Instead of mailing them you took them down?

A Took them down once and sent them down by mail later. I will say that it was understood that anything we did in this matter was without prejudice as to this present contention of ours.

97 Q Now after you had submitted these last labels which I questioned you about you received a letter, did you not, from the Department, dated May 31st, 1913? A Yes.

Mr. Houts: I will read Defendant's Exhibit 3 in evidence, May 31st, 1913.

"Y-11
May 31, 1913.

The Blanton Company,
St. Louis, Mo.

Gentlemen:

Referring to your letter of the 20th inst., relative to the inclosed sketch of wrapper, "Creamo Brand Oleomargarine," "Contains no Cream", submitted for establishment 668, you are advised that the words "Creamo Brand Oleomargarine", should be in the same size and style of lettering. In addition to this, it will be necessary that the following statements be omitted, since they are either misleading within the meaning

of section 11, Regulation 18, or are questionable: "Absolute Purity", "Better than ordinary butter for cooking and baking", "Ten to Twelve ounces does the [word] of a pound of butter", "Air Tight".

Approval is withheld pending receipt of sketches, corrected to conform to Bureau requirements.

Very respectfully,
CHIEF, MEAT INSPECTION BUREAU.

Inclosure 611."

A That label was never brought out; we never accepted that.

98 Q Then on June 20th the Department wrote you this letter, which I show you marked Defendant's Exhibit 4, did it not (hands witness same)? A Yes sir.

Mr. Houts: I will read this in evidence.

"Y-11
June 20, 1913.

The Blanton Company,
St. Louis, Mo.
Gentlemen:

Referring to your letter of the 7th instant, and previous correspondence relative to the use of the word "Creamo", in connection with oleomargarine prepared at establishment 668, you are advised that oleomargarine containing not less than 10 per cent cream, may be labeled, "Creamo Brand Oleomargarine." These words should appear in uniform size and style of lettering.

Very respectfully,
CHIEF, MEAT INSPECTION DIVISION"

Mr. Houts: Then on October 27th in answer to a letter of yours the Department wrote you this letter, marked Defendant's Exhibit 5, did it not—that is October 27th, 1913?

A Yes.

Mr. Houts: That letter I offer in evidence and will read it as well as the others.

"Y-8, 133
October 27, 1913.

The Blanton Company,
St. Louis, Mo.
Gentlemen:

99 Referring to your letter of the 15th instant making inquiry as to whether oleomargarine containing not less than ten per cent of cream may be labeled "Creamo" without the addition of the word "brand", provided same is accompanied by a statement to the effect that "Creamo" is a patented trade mark, you are advised that

the Bureau will insist that if the word "Creamo" is used same be followed by the word "brand" in the same size and style of lettering.

Very respectfully,

CHIEF, MEAT INSPECTION DIVISION".

The Court: What was the purpose of the word "brand"? What did they want that in for?

Mr. Houts: I can only say from hearsay, Your Honor.

The Court: I want to ask for information. What do they want with the word "brand" in there?

Mr. Houts: The idea of the Department was that by the use of the word Brand the word "Creamo to define "brand" and not define "oleomargarine".

The Court: On the "Creamo Brand"?

The Witness: That is the very point I make, that the public wants to know what Your Honor is asking. That is exactly the point at issue.

Mr. Houts: Now Mr. Blanton, I hand you letter dated January 31st, 1914, marked Defendant's Exhibit 6, and ask you if you received the original of that letter?

A Yes that is the straw that "broke the camel's back".

Mr. Houts: I offer that letter in evidence.

Said letter marked Defendant's Exhibit 6 for identification, offered and admitted in evidence, is in words and figures as follows, to-wit:

100

"Y-8, 133
Jan. 31, 1914.

FWM-ECH
The Blanton Company,
St. Louis, Mo.
Gentlemen:

Referring to your letter of the 24th ultimo relative to the inclosed sketches of labels submitted for Est. 668, you are advised that these sketches are disapproved inasmuch as the word "Brand" is either omitted or appears in such location or size and style of lettering that it does not modify the term "Creamo". In no instance does the word "Oleomargarine" appear in lettering similar to the balance of the name. As indicated in previous correspondence it will be necessary if the word "Creamo" is used in connection with oleomargarine that the same be followed by the words "Brand" and "Oleomargarine" and the statement "Creamo Brand Oleomargarine" appear in uniform size, style, and color of lettering. If the product contains no cream it will be necessary that there appear in direct connection with the name the statement "Contains no cream." If cream is used in quantities not

less than ten per cent, the name "Creamo Brand Oleomargarine" need not be further modified

With reference to the statement "Over ten per cent cream" you are advised that exception is taken to the word "Over" in this statement, this being too indefinite and therefore misleading. The Bureau will offer no objection to the exact percentage of cream being stated on the label in connection with the name "Creamo Brand Oleomargarine."

101 Approval of the labels is withheld pending receipt of sketches corrected to conform to Bureau requirements and accompanied by information relative to the percentages of the various ingredients to be employed in the preparation of the products for which the labels are intended.

In view of the length of time which has elapsed since your attention was called to the fact that certain labels, etc., in use at Est. 668 do not conform to Bureau requirements a copy of this letter is today being forwarded to the inspector in charge, St. Louis, Mo., with instructions that on and after March 1, 1914, he prohibit the use of all labels, wrappers, cartons, etc., which do not bear the Bureau stamp of approval and number.

Very respectfully,
ACTING CHIEF OF BUREAU.

Inclosure 221."

Mr. Houts: Now after—

The Witness: May I explain why we could not comply with that letter?

The Court: Yes.

A He asks us to do something that is a physical impossibility. He asks us to state the exact percentage of cream in these goods. Cream being a liquid, goes into our goods—it is only solids that we can absolutely save; cream being a liquid, going over these goods, it will be impossible for a chemist to take our goods and say, and we couldn't say whether ten or twelve or fifteen per cent of cream, and we wanted a carton with safety we wanted to say over ten per cent. In that letter—the idea was to make us say something on that label that would be a physical impossibility

102 for us to sustain; and the whole treatment is so arbitrary that we could not—the whole treatment has been so arbitrary that it is a physical impossibility to comply with the stand that the department has taken on this matter, an absolute impossibility.

Mr. Houts: You have always understood, have you not, that the department did not require you to state the percentages of cream if you had over ten per cent and if you used the word "brand" in the label? A We have always understood.

Q I say you understood that?

A We have always understood that they had nothing to do with our formulas whatever.

Q That is not the question. I am asking you as to your understanding of the Department's position?

A We never understood the Department's position on anything.

Q At least in 1913 you understood that they would permit the label "Creamo Brand Oleomargarine" provided you had at least ten per cent of cream, did you not?

A But back in 1908 they permitted something else.

Q Now answer that question. I am getting down to 1913.

A Well, I will say that various members of that Department permit one thing, another member does not permit the same thing, and we don't know where we are at. In these various letters the Solicitor says our labels are all right; the clerk in the Bureau office says different. The one that rules was the last letter; is the one we have got to go by.

Q Well, according to the last information that you had at least, put it that way—the last advice that you had in writing from the Department, you understood that if
103 you put ten per cent of cream in your oleomargarine you could sell it under the label Creamo Brand Oleomargarine without further qualification, didn't you?

A That was the opinion of—

Q Just answer that question, if you had that understanding under that letter?

A No, I didn't have that understanding. So many different understandings down there you couldn't get two alike.

Q I asked you simply if you got that understanding?

A I never got any complete understanding at all; because the Solicitor said one thing and the other Department said another, and they would not allow the local inspector to say anything.

Q Now, as a matter of fact, your "Creamo Brand" or "creamo oleomargarine" has had varying percentages of cream in it, hasn't it? A Certainly; you have got to have.

Q Some of it has had no cream at all, isn't that true?

A Certainly, absolutely right.

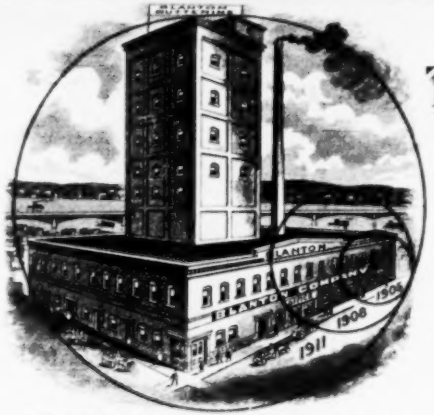
Q You use skimmed milk?

A Absolutely, and get a better product than I can from cream.

Q And that has all been sold under the one name, "Creamo Oleomargarine"?

A Absolutely, certainly. We sell this under the supervision of the Internal Revenue Department.

Q Now in connection with your business you use letter-heads and advertising—you have used letter-heads as follows, have you not? "Executive Offices: The Blanton Company.



THE FASTEST GROWING PLANT IN THE WORLD

SALES DEPARTMENT

THE BLANTON COMPANY

CHURNERS OF

Creamo

THE ONLY

FULL CREAM BUTTERINE

BLANTON · QUALITY · B · QUALITY · BLANTON ·

113 TO 131
SPRUCE STREET SAINT LOUIS

Churners of Creamo", that word "Creamo" the same style and type as in your label, and under the word "Creamo" you had the words "The only Full Cream Butterine"?

104 A That is right

Q You use that today?

A Will you allow me to qualify that?

Q Anyway in accordance with the facts?

A We have used that form the last eight years. That form was originally taken from the cheese industry. At that time we were using a cream milk that was full cream, and when you make cheese from a "full milk cream" they call it a full cream cheese. Our competitors at that time were using a skimmed milk, and we wanted to bring out the fact in our literature, as we assumed we had a right to so qualify our goods, that we were using whole cream milk. You don't understand that, because you are not in the cheese business, but that don't mean it is a solid cream and you can pick it up like butter.

Q With that explanation, as a matter of fact, this letter-head has been used and is still being used by your company in its transactions with its customers, is that not so?

A Certainly. We never assumed that the Department had any inspection over our letter-head; we never took that into consideration.

Q But I say this has been used in the advertisement and sale of the Creamo carton?

A Yes, it has, and I am only sorry it has not been used more.

Mr. Houts: I would like to have one of those letter-heads in evidence.

Mr. Barclay: We will give you one.

Said letter-head offered and admitted in evidence is in words and figures as follows, to-wit:

105 Mr. Houts: Now you have a number of brands besides "Creamo Oleomargarine", have you not?

A O yes, we have quite a number.

Q What different brands have you? A Well, we have got what we call our "Margo", our "Cunado", our "Creamo Bakers Special" and our "Creamo Cake Special", which are our leading brands. From time to time we have made up special brands, such as "Golden Rod". We have another brand called "Blanco", which by the way were qualified.

Q Didn't you have also a brand known as "Clover Creme"?

A That has been withdrawn several years ago.

Q You also had a brand called "Fulcreme"? A We had that, but that has been withdrawn.

Q That has been withdrawn too? A Yes sir.

Q How long ago? A When our attention was called to the

fact that these brands might be considered misleading we then told the Department we would withdraw it immediately.

Q That was in 1912, was it? A Yes.

Q And you also had a brand called "Extracreme"? A We had that.

106 Q Did you withdraw that, too?

A We withdrew that. When it was intimated they might be misleading we told the Department that we wouldn't spend any money in advertising them.

Q And you withdrew all except the word "Creamo"?

A Yes, which was the one that was the least misleading.

Q The least misleading?

A It was the least misleading, and in which we had spent a lot of money in popularizing and establishing it.

Mr. Houts: I believe that is all, if Your Honor please.

The Court: Anything further, Judge Barclay?

Re-Direct Examination by Mr. Barclay.

Q This letter which was referred to by the Department in May, 1913—did you write any letter about that time—did you write a letter to the Department in which you describe the nature of your discussion with them, in regard to its being done without prejudice to your rights, whatever they might be?

Mr. Houts: Let him put the letter in.

Mr. Barclay: I want to put the letter in evidence. There may be some matters there not necessary to this particular feature.

Q This was the letter? A Yes.

Said letter to the Bureau of Animal Industry, Washington, D. C., Dated May 20th, 1913, was read in evidence and is in words and figures as follows, to-wit:

"May 20, 1913.

Bureau of Animal Industry,
Washington, D. C.

Gentlemen:—

107 We have yours of May 13th, and note you say concerning our Creamo Oleomargarine label "that in view of the fact that the product contains no cream the designation "Creamo" is considered misleading."

In keeping with your letter we have decided to return to the use of cream in these goods and make our formula conform to your interpretation of this label. We assume by using cream we will be able to use our label as originally approved by you. In making this change we are doing so without prejudice as to any future action.

Our attorney is of the opinion that our statement to which you refer should not have been submitted as a legal presenta-

tion of the case. It will be remembered that the statement was originally prepared for Dr. Melvin, but was at his suggestion made to the Honorable Solicitor.

We note your reference to the law as to trade names which are false and deceptive. If "Creamo" is a trade name and is synonymous with the word "cream", then we are building a business on falsehood and deception, which is neither right nor good business. If, on the other hand, "Creamo" does not spell and necessarily mean "cream", and is not a trade name, then we are advised that its use is legal and we are within our rights.

There seems to be an honest difference of opinion between us, and we suggest it may be settled by an amicable court proceeding which will be final, as it is not our desire to build up this brand under a cloud. We hope in time to make this brand very valuable, and to do so under these conditions is most undesirable.

We are submitting a new label in keeping with the
108 suggestion in your letter, which we will use should we be unable to put out a competitive commercial product under the changed conditions; this label to be used without prejudice as noted above.

If this label is satisfactory we will ask you to kindly approve it.

Very truly,

THE BLANTON COMPANY,

1M (Signed) D. A. BLANTON, prest."

Mr. Barclay: Now the word "Fulcreme" as I understand, in the dairy industry means cream from which no milk has been extracted, is that right?

A That is right. At the time we advertised it was at the time that the Government's milk chemist had discovered that it was not the butter fat in milk which produced the flavor—the flavor comes from skimmed milk, and therefore we could get as much flavor from skimmed milk as whole milk. We did not fall into that line until several years after our competitors had fully established the quality of those goods. And it is a well known fact in manufacturing circles today that a good pure skimmed milk will produce as much flavor in a neutral—more so than the milk with the cream in it. The cream being a butter fat, is a substance that decomposes and becomes rancid and, as a matter of fact, better goods can be produced with the scientific use of skimmed milk than can be produced with the use of excessive amounts of cream which decomposes and becomes rancid. That is the scientific aspect of the question. This aspect of the question has been developed since we established that line of our stationery.
109 We do not like to change our stationery any more than

we like to change our labels. Therefore we continued to use it. It is expensive, too. Those plates cost money. To make those changes costs a great deal of money.

Q Did you in view of the interpretation which the Department had placed, if you had been permitted to use your regular trade-mark [you,] been willing to use at least ten per cent cream?

A We were willing to do anything that would pacify this department. We wanted to comply with all their rules and regulations and at the same time we wanted to maintain our business without any big financial loss. We went down there and made that plea to the solicitor, and told him that to do the thing that his complaints were asking us to do would cause us great financial loss, and if we could maintain the integrity of this label in a way to meet their requirements and at the same time not lose its identity, that we would be only too glad to do so; but that if they wanted us to do impossible things, and change the whole aspect of this label, that we must be shown finally in court; that we could not lose this property without finding out for certain whether it was legal or not. I will say that there is a great big question involved as to whether there is any inspection of labels. Our attorneys tell us that there is no such thing as inspection of labels under this law.

Mr. Barclay: Don't bother with that. A That is all.

Mr. Houts: The Department advised you, did it not, Mr. Blanton, that you could use the word "Creamo Oleo-
110 margarine" if you would also put a statement on the same label that it contained no cream, did they not?

A They did.

J. F. OBERWINDER,

being duly sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Barclay.

Q Please state your name, age, residence and occupation?

A J. F. Oberwinder; age thirty; advertising Dairy Advertising Company, in this city.

Q How long have you been in the advertising business?

Mr. Houts: If it will shorten this examination, I will say to Judge Barclay I have no testimony upon that at all.

Mr. Barclay: I wish to offer a little, because my client is very anxious about one feature. Will you admit him to be an expert?

Mr. Houts: Anything you say.

Mr. Barclay: I do not know myself.

Q How long have you been engaged in that business?

A Since 1901.

Q Have you had considerable to do with this trade-mark that is mentioned in this case?

A I placed the first advertising they ever placed, and have been identified with it ever since.

Q And how much advertising has been done that you know of—through your own agency?

A To specify the dollars and cents or give a financial way?

Q Both?

A In dollars and cents I don't know because the
111 part we played in it in a valuation a minor part, what we spent.

Q Well, state it otherwise?

A Oh, we have done practically all of the advertising from California to New York and from Wisconsin to the Gulf in various forms.

Q What has been the trade product you have advertised?

A Creamo Oleomargarine.

Q Do you know what the value of this trade-mark is, in your experience in advertising, what the trade value of it is?

A The only value is the trade-mark altogether.

Q Could you approximate what the value of that would be?

A No, I haven't—not Creamo—I have the other articles, because I have known what has been offered for them.

Q You couldn't place any value on this?

A No; it would be many times greater than they have spent, many folds.

Q It would be at least as much as they have spent?

A Many times more.

Q What would be the effect upon a trade-mark or trade-name such as this of changing its character or form presented to the public? A It would be worse than starting over.

Q Would it be damaging and injurious financially?

A Absolutely damaging.

BRUCE DOUGAN,

being duly sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Barclay.

Q Please state your name, age, residence and occupation?

A Bruce Dougan.

112 Q Your line of business, Mr. Dougan?

A I am in the advertising business.

Q With what concern? A Western Advertising Company.

[A] [Yow] long have you been engaged in advertising?

A About eighteen years.

Q Do you know anything about this trade-mark and to what extent it has been advertised? A Yes I know.

Q State your personal knowledge about that?

A Well, they advertise in the cars in St. Louis. We control the street car advertising. They advertised with us to some extent.

Q How long has that been going on?

A I think they advertised one or two years with us, I don't remember just how much longer.

Q Are you acquainted with the nature of the trade-mark and the business that they carry on? A Yes.

Q Are you able to approximate the value of that trade-mark from an advertising man's point of view?

A No, I cannot say how valuable it is.

Q What would it be with respect to the cost that had been expended in giving it publicity?

A Well, that would depend on the character of the goods and way it is selling, and so forth. Sometimes the goods may be advertised extensively and yet have value, but the way this is going I would say it is a rather valuable trade-mark.

Q What would the effect upon the trade-mark, such as we have seen here, the one presented in the bill, if the form of it was changed in a substantial manner—what would be the effect upon it with the consumer, with the public, as to its value?

A That would seriously interfere with it unless it was
113 advertised again and the same process gone over.

Q Practically beginning over with a new trade-mark?

A Yes sir.

Cross Examination by Mr. Houts.

Q Would that be true if the word "Brand" merely were added to it?

A Well, it would depend on the reformation of it entirely. I don't know how hardly to answer that. It would depend a great deal on the re-shaping, how it was re-shaped and re-colored, that would make a difference. I believe it would interfere some.

FREDERICK A. SOUTHWICK,

being duly sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Barclay.

Q State your name, age, residence and occupation?

A Frederick A. Southwick; St. Louis; occupation advertising manager of the Blanton Company.

Q You are over twenty-one? A Slightly.

Q How long have you been with the Blanton Company?

A Since May 1st, 1906.

Q Have you had anything to do with the publicity department?

A I have had practically the entire charge of it during that time.

Q State during the time that you have been in charge the amount of publicity that has been given to this trade-mark that we are talking about in this case?

A We have advertised in the newspapers and the
114 street cars; we have advertised by direct solicitation; we have advertised by trade circular letter work; in fact, we have used almost every conceivable means of popularizing the goods.

To what extent have you increased the business represented by this trade-mark during the time that you have been in this position?

A Our business has increased since I came with this company practically four and a half or five hundred per cent.

Q And how much of that has been in this product marked with this trade-mark "Creamo Oleomargarine"—how much of it has been for that?

A We claim that that has been—in fact, all of it, if I understand the question right, that has been the foundation of the increase.

Q Is that the only product of your department you have advertised, the Creamo?

A The only one we have expended any money on.

Q How much has been expended during the time you have been in charge of the publicity department by the Blanton Company in the advertising of this Creamo Oleomargarine?

A Basing it on the last year, the way I can put it, between eight and ten thousand dollars per year.

Q For how long a period to your knowledge?

A Well, we started the first two years that I was with the company this package proposition was working out, and when we finally got the package on the market then we started in to push the goods.

Q Has this business been popular with the dealer?

A It has.

115 Q The one marked with this trade-mark? A It has.

Q How much experience in publicity have you had apart from this business of the Blanton Company?

A I have been in advertising business upwards for twenty years.

Q What forms have these advertisements taken in different parts of the country—a great many forms?

A I don't know that I know just what you mean by "forms"?

Q I mean in what way have you advertised?

A Newspapers, street cars, bill-boards, circular work, direct personal solicitation by demonstrators.

Q Have you any means of determining what is the value of the trade-mark under a reasonable approximation of it?

A Well, from a general knowledge of trade-marks I know that an advertised brand is the chief asset of any business, and it is worth many more times, often estimated, than all the money invested in plant machinery or the entire facilities that the company may have.

Q The way in which this trade package is used in reaching the ultimate [comsumer] in the form through which it comes from the factory, does that have any effect upon the value of the trade-mark? A It certainly has; it has all of the value.

Q Have you been able to make an estimate of the value of that from your previous experience in dealing with trade-marks, the present value of the trade mark to the Blanton Company as a business?

A If I had that trade-mark I would not take a half million dollars for it today.

Q If that means that is what you think it is worth—

A That is what I think it is worth. It is worth more
116 than that because it is a continual growing worth, and a worth that can be made more valuable every year.

Q From your experience in advertising and dealing in matters of this kind of publicity what would be the effect if you know of changing the form in the manner suggested by the Government, putting "Creamo Brand" on one line, and the same short letters "Oleomargarine" below?

A In the first place it would make it foolish, ludicrous and absolutely destroy its value as a trade-mark.

Mr. Barclay: That is all.

Mr. Houts: That is all.

WALLER EDWARDS.

being duly sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Barclay.

Q Please state your name, age, residence and occupation, Mr. Edwards?

A Waller Edwards; 5583 Bartmer Avenue; advertising agent.

Q How long have you been engaged in advertising?

A About seven years, nearly eight years.

Q You have had a large experience besides, in the publishing business before that, and newspaper business, too?

A Yes sir.

Q You have had a great many kinds of experience in the domain of publicity? A Yes.

Q Are you acquainted with this trade-mark "Creamo Oleomargarine"? A Yes sir.

117 Q How long have you known that?

A About six or seven years.

Q With what concern are you now connected in the advertising business?

A The Nelson Chesman, and College & Commerce of Finance, St. Louis University.

Q You are a lecturer on that subject? A Advertising.

Q Nelson Chesman is one of the largest, if not the largest establishment of the kind in the United States?

A One of the largest advertising agencies.

Q Now are you acquainted with this trade-mark that is the subject of this action? A Yes sir.

Q To what extent has that been given publicity, or to what extent has that been advertised so far as you are aware?

A Well, it has been advertised since I have known it more or less extensively in the line of general publicity, in the line of direct sales promotion over the greater part of the country —in fact, all over the country.

Q By that you mean the United States? A Yes sir.

Q Have you any opinion from what you know of the use that has been made of it and the publicity given to it as to its value as a trade-mark?

A I would consider it very valuable.

Q Have you any definite opinion as to what its value is?

A Well, from an examination that I made of this subject once with a view of placing advertising for this concern, I would say that in my judgment the value of this trade-mark would be approximately two hundred and twenty-five or two hundred and fifty thousand dollars.

Q I am speaking, of course of the trade-mark "Creamo Oleomargarine", you understand, only? A Yes sir.

118 Q You have seen the cartons or the forms in which this is presented to the trade, have you not?

A I have; yes sir.

Q And you understand that the purpose of this arrangement is to reach the ultimate consumer in this form, do you not?

A Yes sir.

Q Now assuming that, what would be the effect, in your opinion, of changing the form of this so it would be "Creamo Brand" in the same size letters and "Oleomargarine" in the same size letters instead of what appears there now—what would be the effect in your opinion, upon the value of that trade-mark?

A Well, practically to destroy the value, because the work

that has been done by this company in pushing and advertising this package and the brand in its present form, would have to be done all over again; that is a common experience in advertising.

Q Can you tell His Honor, or perhaps the rest of us who are not experienced in the effect of publicity upon the public, what is the basis of that opinion?

A Well, I base my opinion on the experience I have had in advertising of brands which have been changed, and found that it was like introducing an absolutely new proposition; that you could not rely for any growing advertising value upon the good will of the old brand. The new would have to stand on a base separate to itself.

Mr. Barclay: That is all.

Cross Examination by Mr. Houts.

Q Mr. Edwards, give me an illustration of some brand that has been changed in that way upon which you base
119 that opinion?

A Why "Faust Coffee" which was changed to "Faust Blend".

Q That was not a substitute of the word "Brand"?

A It wasn't a substitution of the word "Brand" but it was in effect.

Q Blend and [doffee] don't mean the same thing? A No.

Q That was an entire change. Do you know of any illustration where the word "Brand" was used?

A The word "coffee" was used in both instances. The "Faust Blend" operated as an entirely new coffee.

Q Your "Blend" is different from ordinary coffee; it means a combination, doesn't it? A Yes, but it was the same coffee.

Q Well people didn't know it though, did they?

A No, now when they called it "Blend"; that was changing the brand.

Q In the word "brand"—do you know of any case where the word "brand" was added and injured or destroyed the value of it? A I don't know if I can state right off-hand.

Q No. Now take this label that is in the bill of complaint, filed with the bill of complaint, what effect would it have upon this if now were added there the words "contains no cream", leaving the label as it is except adding the words "contains no cream", what effect would that have?

A Well, to suggest to the purchaser something that he had never thought of before.

Q You mean by that that it would remove the idea that there was cream there, isn't that what you mean?
120 A No, it would put in his mind an idea—

Q That there was no cream there?

A That there was no cream there, and that he had never even thought of it before as having cream.

Q The effect would be to indicate to him that there was no cream? A Naturally.

Q Well, using it this way with the word "creamo", does that suggest to anyone that it has cream in it?

A I would say not. I believe the first intimation in the mind of the purchaser there would be it is below—something like the label of a certain brand of cigars and put in there—

The Court: If the oleomargarine isn't any better than these Creamo cigars what would you have to say about that?

(No response).

Mr. Barclay: The Plaintiff rests.

Plaintiff Rests.

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121 (Testimony for Defendants.)

Thereupon the defendants to sustain the issues upon [then] part offered and introduced evidence as follows, to-wit:

Mr. Houts: I want to introduce paragraph 1 of Section 8 of Regulation No. 3, governing the meat inspection, United States Department of Agriculture, as amended, effective May 1st, 1908. That paragraph, Your Honor, is as follows:

"Section 8, Meat Food Products.—Paragraph 1. A meat food product, within the meaning of the meat-inspection act and of these regulations, is considered to be any article of food intended for human use which is derived or prepared in whole or in part from any edible portion of the carcass of cattle, sheep, swine, or goats, if the said edible portion so used is a considerable and definite portion of the finished food."

Mr. Houts: Now I want to introduce in evidence regulation 18, and particularly section 2, Section 10, Section 11 of Regulation 18. I will put in the whole Regulation 18, but those are the ones I want to call Your Honor's attention to particularly. These are set out in my answer, and I won't read them here to your Honor now.

Said Regulation 18 offered and admitted in evidence is in words and figures as follows, to-wit:

"Regulation 18. Trade Labels.

Trade Labels.

Section 1. Upon each can, pot, tin, canvas, or other receptacle, or covering containing any meat or meat food product, which meat or meat food product does not bear the marks "Inspected and Passed," there shall be securely affixed, under the supervision of a Department employee,

122 a trade label before such meat or meat food product

leaves an official establishment. This trade label shall contain, in plain letters and figures of uniform size, the words, "U. S. Inspected and Passed," the number of the official establishment at which the meat or meat food product is last processed, and the true name of the meat or meat food product contained in such package. The words "under the act of Congress of June 30, 1906," may be placed upon the label after the words "U. S. Inspected and Passed." An inspector shall not allow trade labels to be affixed until he is satisfied that the contents of the package are sound, healthful, wholesome, and fit for human food, in accordance with the statements on the label.

Proofs to be approved etc.

Section 2. Duplicate copies of each trade label in the form of sketches or proofs shall first be submitted to the Department, and no trade label shall be used until a sketch or proof thereof has been approved. After trade labels are printed from approved proofs or sketches they shall be forwarded in triplicate to the Department for approval and filing.

When not to be used.

Section 3. No trade label bearing the words "U. S. Inspected and Passed", or any abbreviation or simulation thereof, shall be used on meat or meat food products which have not been inspected and passed under these regulations, and no trade label bearing the inspection legend, or any abbreviation or simulation thereof, shall be placed upon meat or meat food products except under the supervision of an inspector.

Tin containers embossed or lithographed.

Section 4. Tin containers, embossed or lithographed with the label as prescribed in section 1, will be considered
123 as bearing trade labels. On and after October 1, 1908, all sealed tin containers must have the number of the official establishment where packed embossed, lithographed, or printed thereon.

Essential features.

Section 5. The essential features of a trade label are as follows, and shall appear upon each label:

The true name of the product.

The inspection legend.

The establishment number.

The inspection legend.

Section 6. The inspection legend "U. S. Inspected and Passed," or an authorized abbreviation thereof, and the official establishment number in plain characters or uniform size, which shall be in proper proportion to the general letter-

ing of the label, must be separately and prominently embodied in all trade labels.

Stickers, detachable device, etc.

Section 7. In the case of meat contained in cartons, or in wrappers of paper cloth, or other similar substance, the inspection legend and the official establishment number may be embodied in a sticker or seal of proportionate size prominently displayed with the trade label but not necessarily a part of the trade label, such stickers or seals to be approved by the Department of Agriculture. It is not permissible to affix to meat or meat food products a detachable device of any kind which bears the inspection legend.

Export labels and brands

Section 8. While labels to be affixed for foreign shipment may be printed in a foreign language, the same rules shall apply with reference to false labeling and the naming of ingredients as shall apply to goods prepared for
124 domestic use. The inspection legend and the official establishment number must in all cases appear in English; but if desired they may in addition, literally translated, appear in the language of the country to which the package is destined.

Products prepared for another establishment.

Section 9. Paragraph 1. When an article is prepared by an official establishment for another firm or individual if the name of the said firm or individual is to appear upon the label the statement must be made that the article was "prepared for" or "manufactured for" the firm or individual. Names of subsidiary companies which have legal entity may be used without the prefix "prepared for" or "manufactured for".

Paragraph 2. When a firm or individual not operating under Federal inspection desires to reship inspected and passed meat that has been processed only under Government inspection and is eligible under these regulations for interstate shipment he may affix to the package the following statement: "The meat contained herein has been inspected and passed at an establishment where Federal inspection is maintained."

False or deceptive names.

Section 10. No meat or meat food products shall be sold or offered for sale by any person, firm, or corporation under any false or deceptive name; but the established trade name or names which are usual to such products, which are not false and deceptive and which shall be approved by the Secretary of Agriculture, are permitted.

Misleading pictures designs or devices.

Section 11. No picture, design, or device which gives any false indication of origin or quality shall be used upon any label. The law prohibits any statement, design, or device false in any particular regarding the virtues or properties of the materials contained in the package.

125 The principal ingredient.

Section 12. A meat food product when composed of more than one ingredient shall not bear a trade label with a name stating or purporting to show that the said meat food product is a substance which is not the principal ingredient contained therein, even though such name be an established trade name.

Added Substance.

Section 13. A meat food product that contains a substance or substances, including water, added for the purpose of adulteration and which lessens its food value shall bear a label stating that such substance or substances have been added.

Statement of weight.

Section 14. When any weight is given upon the true container it must be the correct weight, and it must be stated whether this weight is the net weight or the gross weight."

JAMES J. BROUGHAM,

being duly sworn on behalf of the Defendant, testified as follows:

Direct Examination by Mr. Houts.

Q State your name to the Court, please?
A James J. Brougham.
Q Where do you live, Doctor? A 1333 Mont Clair Avenue.
Q What is your official position, Doctor?
A I am Inspector in Charge of the Bureau of Animal Industry and work in St. Louis.
Q How long have you held that position?
A In St. Louis since January, 1902.
Q Before that did you hold an official position?
126 A At National Stock Yards from 1892 to 1902, when I was transferred over here.
Q Now are you familiar with the plant of the Blanton Manufacturing Company in St. Louis? A Yes sir.
Q What is its designation in your Department?
A It is known as Establishment 668.
Q Now you have had correspondence, have you, with the Blanton Company? A Yes sir.

Q Certain letters have been read here that were written by you to that company? A Yes sir.

Q And among others letters in which these labels that we have been talking about were disapproved by your Department? A Yes sir.

Q And you advised the Blanton Company of that fact?

A Yes sir.

Q Now attached to the bill of complaint in this case is a letter, Doctor, which is as follows: It is dated February 10th 1914, and is on the letter-head of the United States Department of Agriculture, Local Office:

United States Department of Agriculture,
Bureau of Animal Industry,
local office.
924 Chemical Bldg.,
St. Louis, Mo., February 10th, 1914.

Judge Shepard Barclay,
Rooms 311-312,
Commercial Bldg., City.

Dear Sir:

Referring to your letter of February 9th, relative to a copy of a letter to the Blanton Co. on the subject of a
127 trade label "Creamo". You are advised that if I do not receive instructions to the contrary between this date and March 1st, on and after that date, the use of that label will not be allowed. I can not state whether further consideration of this subject would be given by our Bureau if requested; however this subject has been under consideration for some time and I suppose has been referred to our legal department for advice.

Very respectfully:
(Signed) JAS. J. BROUGHAM
Inspector in Charge."

Q Now what were your duties down there, first, Doctor?

A To inspect—inspection and sanitation.

Q What do you do in the way of inspection?

A We see the raw product when it is taken into the house, and we also see the product manufactured, and also see if it is properly marked—marked "United States [Inpsection] and Passed."

Q Who is under you down there?

A At the present time Mr. Stankey.

Q Was he at the time that this letter was written?

A Yes sir.

Q And has been since? A Yes sir.

Q Now after you have inspected these products of this factory what do you do then?

A Why, then we see them packed and see that this mark of inspection is placed on it.

Q Or if the product does not conform to the regulation and the law then what do you do? A If it is unsound we condemn.

Q You notify them to that effect?

128 A Yes, if it is unsound, and we would destroy it for food purposes.

Q If it were unsound? A If it were unsound.

Q Now in the case of the use of this label, you say there in that letter that use of that label would not be allowed. In the event that label had been placed upon the product of the Blanton Company—I mean if the label used by the Blanton Company was not approved by the Secretary of Agriculture what would have been your course?

A We would not allow that product the—

The Court: That is to say the action there on the first of March that you mentioned in that letter?

Mr. Houts: What would have been your duty then on the first of March?

A We would not allow that inspection label to be placed on the package; we would not care about the "creamo", but the "U. S. Inspection and Passed" we would not allow that to be put on.

Q This "U. S. Inspection and Passed" is the Government's stamp? A It is.

The Court: Up to that time you did put that stamp on it?

A Yes sir.

Q And after that time you would not have put the stamp on? A No, sir.

Mr. Houts: Then what would you have done with respect to such a product as was shipped and sold without the label upon it?

A It could be taken out in the State, but if it was shipped out into a State I would put it up to the District Attorney's office.

129 Q You would have reported the facts to the District Attorney's office? A For prosecution.

Q Did you have any intention of prohibiting by physical force in any way the use of that label? A No sir.

Mr. Barclay: We object to that.

The Court: You mean to say take a man there and say not use it?

Mr. Houts: Yes.

The Court: Go on.

Mr. Barclay: We object.

The Court: The question here, as you have understood all the time, is as to whether this concern may continue to use this brand, and if they are permitted to use it, why then the

Government is supposed to do just as before they forbid it, isn't that it?

Mr. Houts: I am trying to show as far as Dr. Brougham and Mr. Stankey are concerned that if this letter of instructions was not conformed to all they could have done would have been to report to me, and they would not have put the "U. S. Inspection and Passed", upon his products.

The Court: Ask the question.

Mr. Houts: Would you have done anything else besides refuse to put the Government stamp "U. S. Inspection and Passed" upon it and report it to me?

A That would have been the extent of my duties.

Q That is all you would have done?

A I would not reported to you unless I had caught a shipment being shipped out interstate.

130 The Court: That is, you would not have had to report to the District Attorney until a shipment intended for an interstate shipment? A Yes sir:

Q And then you would have reported to the District Attorney that this interstate shipment was made by this plaintiff in violation of the regulation of the Department?

A Yes, sir, that is it.

Mr. Houts: That is all.

Cross Examination by Mr. Barclay.

Q Doctor, what is the course, for instance; The inspection would be stopped which had been going in—what would be the course in regard to notifying the transportation companies, your notifying them?

A Why, inspection would not be stopped just on that label alone. That is, if the house stopped inspection you mean?

Q Yes, if the Government should stop it.

A Well, if inspection were taken away from them by the Department then we would notify the transportation companies not to accept their goods for interstate shipment.

Q For interstate business only? A Interstate.

Q It could do business locally but it couldn't consign anything out of the state, is that right? A Yes sir.

Q It would prevent them from shipping goods that had been previously under inspection by the transportation companies outside of Missouri?

A Yes—that is any goods that would be manufactured after inspection was taken away—I say if the Department removed the inspection.

Q If the Department removed the inspection of course
131 they could still ship matter that had been previously inspected and marked, but such matters as afterwards

manufactured and not marked could not be shipped out of the State by the transportation company?

A Not without violating the law.

Q Would it not be part of your duties in connection with the matter of inspection to notify the transportation companies that you had suspended inspection? A Yes.

Q I take it for granted that every step you have taken in the progress of this [mtter] by virtue of this correspondence and your action in regard to the labels—your duties and action have been under the direction of the Bureau of Animal Industry? A Yes, sir.

Q Not upon your own [intiiative] but upon the direction of the Department, is that correct? A Yes, sir.

Q When was the change in the Department of Agriculture —when was the change made there?

A You mean the new law?

Q Under the new law?

A The amendment to the old law was October 30th, 1906.

Q June?

A June, but didn't go into effect until October 30th.

Q Along at that time and in the year 1907 who was the head of the Department of Agriculture at that time?

A Secretary of Agriculture.?

Q Yes. A Mr. Wilson.

Q James Wilson? A Yes.

Q When did he retire from office?

A I think at the beginning of the new administration.

Q 1913? A Yes, sir.

132 Do you know who was the Secretary of the Treasury in 1907, prior to that time?

Mr. Barclay: Does Your Honor remember?

The Court: Leslie M. Shaw.

Mr. Barclay: Does Your Honor remember when he went out?

The Court: I could not say.

Mr. Barclay: Cortelyou became Secretary of the Treasury on the 4th of March, 1904.

The Court: I think Shaw resigned in 1906.

Mr. Barclay: We ask Your Honor to take judicial notice of whatever that change was.

Mr. Barclay: Of course, you did not communicate to Mr. Blanton what the Government's purpose was when that letter was sent, you just sent that letter without any further—

The Witness: I beg your pardon.

Mr. Barclay: I say there was no communication to Mr. Blanton of what the Government intended to do when he got that letter?

A Why, Mr. Blanton got the letter direct from the Department and I only received a copy.

Mr. Barclay: That is all.

Re-Direct Examination by Mr. Houts.

Q Doctor, were there any orders issued that you know of to the effect that inspection was to be removed from the Blanton Company's plant if they continued that label after March 1st? A No, sir, no intention at all.

Q When you say you would notify the transportation companies that to accept interstate shipment when inspec-
133 tion was removed from a plant, you mean when inspection was entirely removed? A Entirely taken away.

Q Your statement does not apply to such a condition as would have existed down there after March 1st?

A No, sir, not at all.

Re-Cross Examination by Mr. Barclay.

Q Am I wrong in supposing that the intent was—to understand on your previous examination that if they had not complied with these orders that you would have [revmoved] the inspection?

A No, sir; we would remove that inspection sign "U. S. Inspection and Passed".

The Court: That is you would refuse to pass it out?

Mr. Barclay: You would refuse to pass it out?

A No. They could take that out in the State and sell it.

Q It would [effect] interstate shipments?

A Well, that would be up to him. If he wanted to follow the law—

Q You would not have physically interfered? A No, sir.

The Court: You would not have put the inspection on it by the Department?

A No, sir.

Q What would you do?

A We would take that part off, that would be removed from that label. As far as the rest of the label is concerned I would not have anything to do with it. All my duty is if they do not comply with the law, if the product is sound and wholesome, I merely refuse to grant it.

Mr. Barclay: That is, you would refuse to put the Government's stamp of inspection on?

A Yes, sir.

134 You would expect him to remove that part of the label —or your representative would remove that part of the label which said it had been inspected by the Government?

A Yes, sir.

Q And so after that was done it would not be legal to ship it out of the State is that right? A Yes, sir.

Q And you only notified the [transportations] companies of that withdrawal of inspection?

A Not unless the inspection was taken away from the plant by the Secretary of Agriculture.

Q Would you leave the inspector there when he had nothing to inspect? A Why he has other brands there.

Q He would go along with the other brands but would not be allowed to—the suspension of the inspection would apply to the Creamo brand, is that right? A Yes, sir.

Q And the other inspection, if it was proper and regular would go on? A Go on.

Q But as far as the "Creamo" brand is concerned, of course— A I would have to refuse to grant it.

Q Take it off? A Yes, sir.

Mr. Barclay: That is all, Doctor.

Mr. Houts: Now, if Your Honor please, I offer these defendant's Exhibits Nos. 1 and 2 in evidence; also defendant's Exhibit No. 3; also defendant's Exhibit No. 4, defendant's Exhibit No. 5 and defendant's Exhibit No. 6, the latter four are letters which have been identified and read to Your Honor.

Said exhibits offered and admitted in evidence are in words and figures as follows, to-wit:

135 Defendant's Exhibit No. 1.

Blanton. Quality.
B
Quality. Blanton.
The Blanton Co.
St. Louis
Creamo
Oleomargarine

Not made in a packing-house but in a special plant designed and completely equipped with every modern appliance for producing high grade goods. Rigid inspection, and the most perfect scientific sanitary measures are observed by us at every step. The result is a product combining absolute purity and perfect uniformity.

This product is sealed immediately after churning in this air-tight, odor-proof package, protecting it from odors and other influences detrimental to purity, quality and sweetness.

After opening package keep in cool, sweet place, away from fruits and vegetables and all contaminating odors.

U. S. Inspected and passed under the Act of Congress, June 30, 1906. Establishment No. 668.

Admirably adapted to table use because of absolute purity and strict uniformity. Better than ordinary butter for cooking and baking, and effects a large saving in cost. Makes delicious cake, and delicate, crisp pastry. Ten to twelve ounces does the work of a pound of butter.

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136 On the end of the carton:

—Not made in a packinghouse—
Blanton. Quality.
B
Quality. Blanton.
—The Blanton Company, St. Louis—

On the end of the carton scratched out:

Approved:
Bureau of Animal Industry
÷ Feb 27 1912 ÷
W K S

Defendant's Exhibit No. 2.

Creamo Brand
Reg. U. S. Pat. Off.

Blanton. Quality.
contains cream B
Quality. Blanton.

Oleomargarine
U. S. Inspected and Passed under the Act of Congress, June 30th, 1906. Establishment No. 668.
Produced by
The Blanton Company
St. Louis, U. S. A.

Defendant's Exhibit No. 3.

"FWM/RDR Y-11
May 31, 1913.

The Blanton Company,
St. Louis, Mo.
Gentlemen:

Referring to your letter of the 20th inst., relative to the inclosed sketch of wrapper, "Creamo Brand Oleomargarine,"

85

"Contains no Cream", submitted for establishment 668 you are advised that the words, "Creamo Brand Oleomargarine", should be in the same size and style of lettering. In addition to this, it will be necessary that the following statements be omitted, since they are either misleading within the meaning of section 11, Regulation 18, or are questionable:
137 "Absolute Purity", "Better than ordinary butter for cooking and baking", "Ten to twelve ounces does the work of a pound of butter", "Air Tight".

Approval is withheld pending receipt of sketches, corrected to conform to Bureau requirements.

Very respectfully,
CHIEF, MEAT INSPECTION DIVISION.

Inclosure 611."

Defendants Exhibit No. 4.

FWM/S "Y-11
The Blanton Company, June 20, 1913.
St. Louis, Mo.
Gentlemen:

Referring to your letter of the 7th instant, and previous correspondence relative to the use of the word "Creamo", in connection with oleomargarine prepared at establishment 668, you are advised that oleomargarine containing not less than 10 per cent cream, may be labeled, "Creamo Brand Oleomargarine." These words should appear in uniform size and style of lettering.

Very respectfully,
CHIEF, MEAT [INPSECTION] DIVISION."

Defendant's Exhibit No. 5.

"FWM/G Y-8.133
The Blanton Company, October 27, 1913.
St. Louis, Mo.
Gentlemen:

Referring to your letter of the 15th instant making inquiry as to whether oleomargarine containing not less than ten per cent of cream may be labeled "Creamo" without the addition of the word "brand", provided same is accompanied by a statement to the effect that "Creamo" is a patented
138 trade mark, you are advised that the Bureau will insist that if the word "Creamo" is used same be followed by the word "brand" in the same size and style of lettering.

Very respectfully,
CHIEF, MEAT INSPECTION DIVISION."

"FWM-ECH Y-8.133
The Blanton Company, Jan. 31, 1914.
St. Louis, Mo.
Gentlemen:

Referring to your letter of the 24th ultimo relative to the inclosed sketches of labels submitted for Est. 668, you are advised that these sketches are disapproved inasmuch as the word "Brand" is either omitted or appears in such location or size and style of lettering that it does not modify the term "Creamo". In no instance does the word "Oleomargarine" appear in lettering similar to the balance of the name. As indicated in previous correspondence it will be necessary if the word "Creamo" is used in connection with oleomargarine that the same be followed by the words "Brand" and "Oleomargarine" and the statement "Creamo Brand Oleomargarine" appear in uniform size, style, and color of lettering. If the product contains no cream it will be necessary that there appear in direct connection with the name the statement "Contains no cream." If cream is used in quantities not less than ten per cent, the name "Creamo Brand Oleomargarine" need not be further modified.

With reference to the statement "Over ten per cent
139 cream" you are advised that exception is taken to the word "Over" in this statement, this being too indefinite and therefore misleading. The Bureau will offer no objection to the exact percentage of cream being stated on the label in connection with the name "Creamo Brand Oleomargarine."

Approval of the labels is withheld pending receipt of sketches corrected to conform to Bureau requirements and accompanied by information relative to the percentages of the various ingredients to be employed in the preparation of the products for which the labels are intended.

In view of the length of time which has elapsed since your attention was called to the fact that certain labels, etc., in use at Est. 668 do not conform to Bureau requirements a copy of this letter is to-day being forwarded to the inspector in charge, St. Louis, Mo., with instructions that on and after March 1, 1914, he prohibit the use of all labels, wrappers, cartons, etc., which do not bear the bureau stamp of approval and number.

Very respectfully,
ACTING CHIEF OF BUREAU."

The Court: Doctor, since the first of March what has been your course with reference to this Creamo Oleomargarine?

A It goes right along.

Q You have been endorsing it as you did before the first of March? A Yes, sir.

Q That is, stamping it by the Government's stamp?
A Yes, sir.

140 Mr. Barclay: That is under the order of Your Honor.

The Court: Well, I say that has been the course you have pursued?

The Witness: Yes, sir.

Mr. Houts: That is all the testimony I have to offer.

Defendant Rests.

The Court: Anything further on the other side?

(Testimony for Plaintiff in Rebuttal.)

DAVID A. BLANTON,

being recalled in rebuttal, testified as follows:

Direct Examination by Mr. Barclay.

Q Mr. Blanton, you are acquainted, of course, with the forms of manufacture of oleomargarine, I suppose? A I am.

Q Can oleomargarine be made without coming within the terms of Section 8 that has been read here—this meat inspection law?

A Oleomargarine can be made and is made very extensively without the use of animal fat whatever. The largest factory producing oleomargarine in the world produces a strictly vegetable oleomargarine without any animal fat whatever.

Q Did you have any notice other than this letter as to what the Government's purpose was to do at the expiration of this time limit? A Did I have any other letters?

Q I say did you have any other information other than this letter as to the purpose of what the Government intended to do when your limit ran out for the use of the Creamo

141 Oleomargarine label?

A That letter I took to be final and was the only qualifying decision that I had, and I immediately submitted it to you as being the final outcome of my negotiations with the Department.

Mr. Barclay: That is all.

Mr. Houts: That is the case, Your Honor.

The above was all the testimony offered.

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142 (Recital of Finding of Issues for Plaintiff, of Entry of Final Decree, etc., and of Orders extending Time to file Bill of Exceptions.)

Thereupon the Court took the case under advisement until the 27th day of April, 1914, and on that day found the issues in favor of the plaintiff.

Thereafter, and on the 13th day of May, 1914, the Court entered a final decree in favor of the plaintiff.

To which finding and entry of decree, the defendants, by counsel, duly excepted then and there at the time.

Thereafter, and on the 19th day of September, 1914, and during the March Term, 1914, of said Court, the Court by an order entered of record granted the defendants James J. Brougham and Arthur N. Stankey until the 20th day of November, 1914, in which to file their Bill of Exceptions in this cause, and continued the case until the September Term, 1914, of said court.

Thereafter, and on the 19th day of October, 1914, the defendants James J. Brougham and Arthur N. Stankey filed in said Court their assignment of errors and petition for appeal, and on said date an appeal was duly allowed them by said court to the United States Circuit Court of Appeals for the Eighth Circuit.

Thereafter, and on the 10th day of November, 1914, the Court by an order duly entered of record granted said defendants until the 15th day of January, 1915, in which to file their Bill of Exceptions in this cause.

Thereafter, and on the 13th day of January, 1915, the Court by an order duly entered of record granted the defendants James J. Brougham and Arthur N. Stankey until the 15th day of March, 1915, in which to file their Bill of Exceptions in this cause.

143 Thereafter, and on the 10th day of March, 1915, the Court by an order duly entered of record granted the defendants James J. Brougham and Arthur N. Stankey, until the 15th day of April, 1915, in which to file their bill of exceptions in this cause.

And within the extended time there was successively further extensions of such time allowed and recorded, as per orders of court as follows: (Hereinbefore inserted).

And within the extended time allowed as aforesaid, defendants present this their bill of exceptions.

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144 (Certificate of Judge to Bill of Exceptions.)

Now on this 22nd day of June, 1915, and within the time allowed by the Court therefor, the defendants James J. Brougham and Arthur N. Stankey present this their Bill of Exceptions in this cause which is now by the Court allowed, signed, sealed, filed and made a part of this cause. All of which is allowed and done at St. Louis, Missouri, this 22nd day of June, 1915.

DAVID P. DYER

Judge of the District Court of the United States for the Eastern Division of the Eastern District of Missouri, and the Judge who tried said cause.

June 21, 1915.

We have no objection to the foregoing bill being signed:—

BARCLAY, ORTHWEIN & WALLACE,
Solicitors for Pltf.

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145 (Clerk's Certificate to Transcript.)

United States of America,
Eastern Division of the Eastern
Judicial District of Missouri—ss.

I, W. W. Nall, Clerk of the District Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in cause No. 4262, of The Blanton Manufacturing Company, plaintiff, versus James J. Brougham, Arthur N. Stankey, et al, Defendants, together with all things of and concerning the same, as fully as the same remains on file and of record in said cause in my office, and that the original Citation is hereto attached and herewith returned.

In witness whereof, I hereunto set my hand and affix the seal of said District Court, at office, in the City of St. Louis, in said Division and District this 30th day of September, A. D. 1915.

W. W. NALL,
Clerk of said Court.
By IRVINE MITCHELL,
Deputy Clerk.

(Seal)

Filed Oct 1 1915
John D. Jordan Clerk

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91 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

Appearance of counsel for appellants.

United States Circuit Court of Appeals, Eighth Circuit.

JAMES L. BROUGHAM, et al., Appellants.
vs.
BLANTON MANUFACTURING COMPANY. } No. 4584.

The clerk will enter my appearance as counsel for the appellants.

ARTHUR L. OLIVER
and
VANCE J. HIGGS.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 15, 1915.

Appearance of counsel for appellee.

The clerk will enter our appearance as counsel for the appellee in said cause.

SHEPARD BARCLAY.

DECEMBER 31, 1915.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 7, 1916.

Order of argument.

December Term, 1916. Monday, December 4, 1916.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Arthur L. Oliver for appellants and continued by Mr. Shepard Barclay for appellee, and the
92 hour for adjournment having arrived further argument is postponed until to-morrow.

Order of submission.

December Term, 1916. Tuesday, December 5, 1916.

This cause having been called for further hearing, argument was resumed by Mr. Shepard Barclay for appellee and concluded by Mr. Arthur L. Oliver for appellants.

Thereupon, this cause was submitted to the court on the transcript of the record from said District Court and the briefs of counsel filed herein.

93 *Opinion.*

United States Circuit Court of Appeals, Eighth Circuit.

No. 4584.—May Term, A. D. 1917.

JAMES J. BROUGHAM and ARTHUR N. Stankey, Appellants,	Appeal from the District Court of the United States for the Eastern District of Missouri.
BLANTON MANUFACTURING COMPANY, Appelle.	

Mr. Arthur L. Oliver, United States Attorney, for appellants.

Mr. Shepard Barclay (Mr. S. Mayner Wallace on the brief), for appellee.

Before Sanborn and Smith, circuit judges, and Amidon, district judge.

SMITH, *Circuit Judge*, delivered the opinion of the Court.

The Meinecike-Blanton Manufacturing Company commenced the manufacture of oleomargarine about 1902. It adopted the trade-mark "Creamo Oleomargarine" for its goods about 1904. It was succeeded by the appellee, the Blanton Manufacturing Company. August 2, 1886, 24 Stats. 209, Congress passed a law imposing a tax of six hundred dollars a year upon all manufacturers of oleomargarine. On May 9, 1902, Congress greatly elaborated this law, 32 Stats. 193, U. S. Compiled Stats. 1916, § 5977. Section 6 of the act, 24 Stats. 209, 210, contained the following:

"SEC. 6. That all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs, or other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall
94 prescribe; and all sales made by manufacturers of oleomargarine, and wholesale dealers in oleomargarine shall be in original stamped packages."

The plantiff's brand was approved by the Commisssioner of Internal Revenue January 19, 1904, and prior to the enactment of the meat inspection law or the pure food law. The label in question has always remained thus approved. On June 30, 1906, Congress passed both the meat inspection law, 34 Stats. 669, 674, and the pure food law, 34 Stats. 768. On April 4, 1907, the Department of Agriculture having taken charge of the inspection of the oleomargarine factory of the Blanton Manufacturing Company under the claim that its oleomargarine was a meat-food product, the Secretary of Agriculture approved the labels on the packages then in use under the trade name "Creamo Oleomargarine." On January 6, 1908, the complaintant made application to register the trade-mark "Creamo

Oleomargarine" in the United States Patent Office. This registration was allowed on January 9, 1908. The Blanton Manufacturing Company continued for years to sell its goods under this label with the express approval or acquiescence of the Treasury and Agricultural Departments. On July 8, 1912, the defendant was expressly officially notified of the approval of the trade label "Creamo Oleomargarine" by the Agricultural Department. For many years the company has spent an average of seven thousand five hundred dollars a year in advertising the commodity under this name and in the past ten years has spent seventy-five thousand dollars in that way but the Department commenced to complain in about 1912 of the use of the word "Creamo." Up to that time the Blanton Manufacturing Company had spent between thirty-five and forty thousand dollars in such advertising. On October 2, 1912, the Chief of the Bureau of Animal Industry wrote the Blanton Manufacturing Company that the use of "Creamo" was considered deceptive and misleading and the Bureau must therefore decline to continue permitting the use of this name in connection with oleomargarine. The letter recited that the Bureau's approval of the use of this name was formerly given. On February 10, 1914, the Inspector in Charge at St. Louis notified the Blanton Manufacturing Company that on and after March 1, 1914, "the use of that label will not be allowed." Thereupon the Blanton Manufacturing Company brought suit in the court below against Dr. James J. Brougham, Chief Inspector in the
95 City of St. Louis of the Bureau of Animal Industry of the Department of Agriculture, Arthur N. Stankey, local inspector of said bureau in charge of the inspection at the manufacturing plant of the Blanton Manufacturing Company, Dr. Alonzo D. Melvin, chief of said bureau, and Honorable David F. Houston, Secretary of Agriculture of the United States, praying that this,

"Court may grant to plaintiff a writ of injunction * * * perpetually enjoining and restraining said defendants from interfering with the use and enjoyment by plaintiff (in interstate commerce or otherwise) of its said trade-mark 'Creamo' Oleomargarine upon its labels now in use in its said business as above described, and from attempting to deprive plaintiff of the use thereof,"

and for general equitable relief. Dr. Brougham and Arthur N. Stankey were served with process and filed answer but the Secretary of Agriculture and the Chief of the Bureau of Animal Industry were not found in the District and did not appear. The case was tried upon the issues joined as between the complainant and Messrs. Brougham and Stankey and the court found the issues in favor of the plaintiff and enjoined Dr. James J. Brougham and Arthur N. Stankey, their agents, successors, and employes, from interfering with the use and enjoyment by the plaintiff, its successors and assigns, in interstate commerce and otherwise of the said trade-mark "Creamo" upon stencils and labels as theretofore approved and used on packages of various sizes for the sale of oleomargarine, and Messrs. Brougham and Stankey appeal.

It is first contended by the appellant that no injunction could rightly have been granted against the appellants because such an injunction could not have been properly granted against the Secretary of Agriculture.

In St. Louis Independent Packing Company *v.* Hon. David F. Houston, ——— C. C. A. ———, ——— Fed. ———, we recently had occasion to fully examine this question and following that case we hold that this injunction could properly have issued against the Secretary of Agriculture had he been served or appeared and he not being within the jurisdiction of the court but having his subordinates there who, it was alleged, were violating the law or about to violate it, upon a proper showing an injunction could issue against them.

96 The plaintiff first insists that its business is governed wholly by the oleomargarine law, 24 Stats., 209; 32 Stats., 193, and that neither the Secretary of Agriculture nor the Bureau of Animal Industry has under the meat-inspection law any power or control over the complainant's business.

The oleomargarine law was enacted under the power of Congress, Constitution, Art. 1, Sec. 8, Par. 1:

"The Congress shall have power to lay and collect taxes, duties, imposts, and excises,"

while the meat-inspection law and the pure-food law were enacted under the power conferred by the Constitution, Art. 1, Sec. 8, Par. 3,

"To regulate commerce with foreign nations, and among the several States and with the Indian tribes;"

Whatever may have been the ulterior purpose in the passage of the oleomargarine law it can not be held that anything in it tended to subtract any power subsequently conferred on the Secretary of Agriculture under the meat-inspection law or upon the Secretary of the Treasury, the Secretary of Agriculture, or the Secretary of Commerce and Labor under the pure-food law.

The first, the oleomargarine law, was enacted in the exercise of the taxing power and this could not prevent Congress under the power to regulate commerce enacting the pure-food law and the meat-inspection law in the interest of the public health or welfare.

The meat-inspection law, in what may be called the preamble, 34 Stats., 669, 674, declares that it is enacted for the purpose of preventing the use in interstate or foreign commerce as hereinafter provided of meat and meat food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food, and further provides, page 675,

"That for the purposes hereinbefore set forth the Secretary of Agriculture shall cause to be made by inspectors appointed for that purpose an examination and inspection of all meat food products prepared for interstate or foreign commerce in any slaughtering, meat canning, salting, packing, rendering, or similar establishment," and provides for marking the same "Inspected and Passed" or "Inspected and Condemned" and the consequences. Meat food

97 products were not more definitely defined and the Secretary of Agriculture in July, 1910, secured the opinion of the Attorney General as to the true definition, 28 Op. Atty. Gen., 369.

It is provided in the meat-inspection law, 34 Stats., 678,

"Said Secretary of Agriculture shall, from time to time, make such rules and regulations as are necessary for the efficient execution of the provisions of this act, and all inspections and examinations made under this act shall be such and made in such manner as described in the rules and regulations prescribed by said Secretary of Agriculture not inconsistent with the provisions of this act."

The Attorney General first having held that the term "similar establishments" as used in the law was intended to include all establishments that were not specially mentioned in which the animal is slaughtered or the carcasses or meat are prepared or in which the meat food product is manufactured then held that the term "meat food product" does not merely embrace a food which consists wholly of the meat of an animal and that the determination of the meaning of the term "meat food product" is essential to the proper enforcement of the meat-inspection law and as Congress has not defined the term and it has no well defined meaning but is one of common use and Congress having vested in the Secretary of Agriculture the power to make such rules and regulations as may be necessary for the efficient execution of the provisions of the act the power to determine what manufactures are meat food products rests in the Secretary of Agriculture subject to the restriction that the definition of the term adopted be not clearly or unquestionably outside the intent of the act. It may not be without importance to state that the opinion was delivered in a case of a compound which consisted of 80% cottonseed oil, clearly not a meat food product, and 20% of oleo stearin, a meat food product. There is no evidence that oleomargarine is not a meat food product, and we regard it as a matter of common knowledge that it is such a product, and clearly, therefore, its manufacture comes within the language of the meat-inspection law.

The meat-inspection law, 34 Stats., 676, provides:

"No such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name; but established
98 trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted."

We are not desirous of deciding more than is before us and must pass upon the question whether the Department of Agriculture could pass upon and approve a trade name under this last statute, which we find "Creamo Oleomargarine" was and is, and approve it in 1907 and again in 1912 and later after an established business had been built up under that name and a vast sum of money expended in the business, with or without evidence, change its ruling and refuse to allow the use of the trade name.

It is not claimed, as we understand it, that the public was deceived by the use of the name "Creamo Oleomargarine." The use of it is objected to upon its similarity to the word "cream" and upon the assumption that some of the public may be deceived into believing that cream is contained in the oleomargarine. The word is not "cream" but "Creamo." It is a rule that words merely descriptive cannot constitute a trade-mark because descriptive words cannot be expressly appropriated and that it is essential to a valid technical trade-mark that the words or phrases be used in a purely arbitrary or fanciful way as applied to the goods in question. "Creamo" is not a word in common use among English-speaking people but is such a fanciful word used by the complainant. But even if the term had been "Cream Of" it would not be objectionable as a brand upon manufactured goods. There is a well-known brand of cigars known as "Cremo Cigars." "Cream of Wheat" is a brand used for breakfast food and "Cream Baking Powder" is a well-known brand of that article. No one has ever assumed there is any cream in the cigar, in the Cream of Wheat or in the Cream Baking Powder.

Could the Department of Agriculture approve the use of the label "Creamo Oleomargarine" as provided in the meat-inspection law and then after a trade had been built up and extended under that name and vast sums of money expended in advertising it change its ruling and forbid its use unless 10%, for instance, of cream was used in the manufacture? We are constrained to say that we do not think any such power was vested in the Secretary of Agriculture.

The decree of the District Court was right and it is affirmed.

Filed May 14, 1917.

99 AMIDON, *District Judge*, dissenting.

I take the facts from the testimony of Mr. Blanton, president of the plaintiff company, below. They are uncontroverted. When the name, "Creamo," was selected, plaintiff was using thirty per cent of cream in its product. The name was chosen to indicate to the consumer and to the trade that cream was used in producing plaintiff's oleomargarine. The fact is that plaintiff sometimes uses cream, sometimes it uses no cream, and sometimes it uses skim milk. Whatever the practice the product is all sold under the name Creamo Oleomargarine. At the same time that the name here involved was chosen plaintiff had another brand of oleomargarine which it marked "Fulcreme" and another one "Extracreme." These were used continuously until they were withdrawn in 1912 by order of the department. Plaintiff's letterhead, used generally in its business, states with a conspicuousness which can not easily be reproduced that the Blanton Company are "churners of Creamo, the only full cream Butterine." These are a few of the conspicuous features of the evidence showing that plaintiff has habitually represented that cream is used in its product. It is also plain that to induce that belief is a decided trade advantage. It is conceded by plaintiff that the representation is false. The name "Creamo" was chosen as a part of this decep-

tion. Mr. Blanton himself testifies with emphasis that the name was chosen to convince the consumer and the trade that cream was an important element in the production of his company's product. As that product is conceded sometimes to contain no cream and sometimes to be made by the use of skim milk, the name is false and deceptive. The proof is further emphasized by the fact that plaintiff in its negotiations with the department refused to add to its label the statement, "contains no cream," or a statement of the percentage of cream used. It is stated that the word "Creamo" is a fancy word and will be so understood. That it seems to me is to indulge in one of the simplest of logical fallacies. Like most words in the language cream has a figurative and a literal meaning. It may signify excellence of quality or it may mean the part of milk that comes to the surface. When the term is applied to a cigar or a breakfast food it is plain enough that it is used in its figurative sense. It will not cause anybody to believe that cream is used in making the cigar or the cereal. How stands the matter in the case of oleomargarine? It has been one of the trade frauds from the time that article was invented to palm it off as a dairy product. The States and the National
100 Government have been engaged for more than a generation in trying to defeat that trade deception. To create the belief that cream is used in the production of oleomargarine has been a part of the fraud. Mr. Blanton is a "practical" man. He probably knew what he was doing when he selected the word "Creamo." He says he chose it to make the consumer and the trade believe that cream was used in the production of his article. To say that the term "cream" will not deceive when it is applied to oleomargarine because it does not deceive when applied to a cigar seems too manifest a fallacy to require answer. As a matter of fact, therefore, I do not see how a plainer demonstration could be made that a trade name is false and deceptive than has been made in this case.

I hesitate, however, to go into this subject, for in my judgment it is committed exclusively to the Secretary of Agriculture by the statute which is quoted in the majority opinion. I am at a loss to harmonize the opinion in this case and that rendered in the recent case of St. Louis Independent Packing Co. *v.* Houston, with the uniform practice of this court and of the Supreme Court, in holding that decisions of the Postmaster General and the Secretary of the Interior on questions of fact are conclusive. Acting upon that principle the decisions of the Land Department and of the Post Office, determining questions of fact in the disposition of the public lands, and in passing upon what forms of business are fraudulent so as to subject them to a fraud order, we have uniformly held that the decisions of those departments are binding upon the courts, and have refused to enter upon any review of their decisions although the gravest interests were involved and the most serious charges of mistake and sometimes of fraud were made. The general rule was stated

by the Supreme Court, upon a full review of the authorities, in Bates & Guild Co. *v.* Payne, 194 U. S., 406, 409, as follows:

"The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department his decision thereon is conclusive, and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of correctness and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing."

101 The doctrine of this court and the Supreme Court on this subject is so axiomatic as to make the citation of authorities unnecessary. Why should not the same rule be applied to the Secretary of Agriculture while enforcing the meat products act? The jurisdiction is the same. The law in plain terms commits to that officer to determine when a trade name is false and deceptive; and yet in this case, and in the other case to which I have referred, this court exercises a power to review his decision which would hardly be exercised in reviewing the findings of a master in chancery. I myself am unable to assign any reason for this variety of practice as between the Postmaster General and the Secretary of the Interior on the one hand and the Secretary of Agriculture on the other, and can find none in the opinion in this case or in the other case.

The opinion in the present case seems to be based mainly upon the ground that the name "Creamo Oleomargine" had been approved by the department in 1908 and in 1912, and plaintiff has expended money in advertising the name, and it is indicated that these facts deprive the department of the power to forbid the use of the name although satisfied that it is false and deceptive. That, it seems to me, is a doctrine fraught with the gravest danger. It has been uniformly held that even the most solemn acts of legislation pursuant to which parties have invested large sums of money, can in no way impair the authority of the State to exercise its police power. Fertilizing Company *v.* Hyde Park, 97 U. S., 659; Texas & N. O. Railroad Co. *v.* Miller, 221 U. S., 408, 414, are cases in which this familiar rule is cited and applied. Can it be possible, then, that a mere executive officer by his mistake, honest or corrupt, can destroy within the field of his jurisdiction a police statute of the Nation? It has been the uniform holding of the courts that the conduct of such officers can not impair the rights of the Government even in civil matters. United States *v.* Pine River Logging & Improvement Co., 89 Fed., 907, 917; United States *v.* Lee Wilson Co., 214 Fed., 630, 651. It seems to me too plain for debate that an executive officer appointed to enforce a statute can not by any act or omission of his impair the power of the Government through a subsequent officer to enforce a police statute. To hold otherwise is to give such officers the power to annul the law. It might well happen that the use of a name at the time of its selection, and even for years thereafter, would appear

to be innocent, and would be approved in the routine course
102 of administrative business; then upon a careful investigation it would be found that the name was chosen and was actually used in the channels of trade for false and deceptive purposes. That seems to be what has occurred in the present case. It seems to me an alarming doctrine that the approval of a name which was in effect selected for purposes of deception can destroy the power of the Government to stop the fraud. Some point is made in the brief that the plaintiff has a registered trade-mark for the term "Creamo Oleomargarine." This seems to have troubled the department in dealing with the name. It is, however, settled law that a trade-mark that is chosen for fraudulent purposes will not be protected even in civil litigation; much less can such a trade-mark be used to impair the power of the Government to enforce a police statute.

In my judgment both on the law and the facts the decree made by the trial court was conspicuously improper and should be reversed.

Filed May 14, 1917.

103 *Decree.*

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1917. Monday, May 14, 1917.

JAMES L. BROUGHAM AND ARTHUR N. STANKEY, Appellants, *vs.* BLANTON MANUFACTURING COMPANY. } No 4584.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause be, and the same is hereby, affirmed without costs to either party in this court.

MAY 14, 1917.

Petition for appeal to Supreme Court, U. S.

The above-named defendants, James J. Brougham and Arthur N. Stankey, conceiving themselves aggrieved by the final judgment and decree entered on May 14, 1917, in the above-entitled proceeding, reversing the order of the district court dismissing complainant's bill and ordering that a decree be entered conforming to complainant's prayer, do hereby appeal from said judgment and decree to the

Supreme Court of the United States, and pray that this, their appeal, may be allowed and that a transcript of the record, proceedings, and papers upon which said judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

104 ARTHUR L. OLIVER.
United States Attorney for defendants and appellants, James J. Brougham and Arthur N. Stankey.

Dated this 2nd day of August, A. D. 1917.
(Endorsed:) Filed in U. S. Circuit Court of Appeals Aug. 3, 1917.

Assignment of errors on appeal to Supreme Court, U. S.

Now come James J. Brougham and Arthur N. Stankey, appellants, and make and file this their assignment of errors:

First. The court erred in its holding and finding that the said defendants and their agents, successors, and employes, jointly and severally, ought to be perpetually enjoined and restrained from interfering with the use and enjoyment by the plaintiff and its successors and assigns of the alleged trade-mark "Cremo" upon stencils and labels as heretofore approved and used on packages of various sizes for the sale of oleomargarine and substantially as described in plaintiff's bill of complaint and in the final decree of the court herein.

Second. The court erred in holding, finding, and decreeing that said defendants, Brougham and Stankey, and their agents, successors, and employes, be perpetually enjoined and restrained from attempting to deprive plaintiff and its successors and assigns of the use of said alleged brand, trade-mark, and label described in said bill of complaint herein, used upon packages of oleomargarine manufactured, packed, sold, or offered for sale by the plaintiff and its agents, successors, assigns, or customers in the prosecution or course of business then conducted by plaintiff as manufacturer and vendor of oleomargarine.

105 Third. The court erred in holding, finding, and decreeing that the plaintiff was entitled to the relief prayed for in its bill of complaint and in entering a judgment and decree awarding to plaintiff such relief so prayed for.

Fourth. The court erred in entering a decree for the plaintiff.

Fifth. The court erred in holding and finding that the name or brand "Cremo" oleomargarine used by plaintiff was and is a trade-mark.

Sixth. The court erred in holding and find that the brand and label described and set forth in the bill of complaint was officially approved by the Bureau of Animal Industry, and that for more than five years complainant used said label upon its products without objection upon the part of the proper officers of the Government and with their approval.

Seventh. The court erred in holding and finding that the plaintiff had a right to use a trade name, to wit, "Creamo Oleomargarine," without the approval of the Secretary of Agriculture.

Eighth. The court erred in holding and finding that the plaintiff had a right to use the name "Creamo" upon its oleomargarine without the approval of the Secretary of Agriculture.

Ninth. The court erred in holding and finding that the defendants, Brougham and Stankey, were not authorized and empowered to withhold from oleomargarine produced by plaintiff and labeled and branded "Creamo Oleomargarine" the stamp or mark "Inspected and Passed" when said name "Creamo Oleomargarine" did not have the approval of the Secretary of Agriculture.

Tenth. The court erred in holding and finding that it would be inequitable upon the part of the Government and its officers to stand by, approve, and acquiesce in this brand for five or six years and then, at great loss to the complainant, refuse further to let its product be sold under this same brand.

106 Eleventh. The court erred in holding and finding that these defendants, Brougham and Stankey, were not authorized and empowered to enforce the rules and regulations adopted and approved by the Secretary of Agriculture and the officers of the Bureau of Animal Industry of the Department of Agriculture which related and pertained to the oleomargarine produced by plaintiff and referred to in its petition.

Twelfth. The court erred in holding and finding that the complainant was entitled to the relief prayed for in its bill and in entering a judgment in accordance therewith.

Thirteenth. The court erred in not entering a judgment and decree in favor of the defendants.

Fourteenth. The court erred in admitting and considering incompetent, immaterial, and irrelevant evidence and in basing its finding and decree thereon.

ARTHUR L. OLIVER,
United States Attorney for Appellants.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Aug. 3, 1917.

Order allowing appeal to Supreme Court, U. S.

Now come defendants in the above-entitled cause, by their solicitor, and file and present to the court their assignment of errors and their petition for an appeal from the final judgment and decree ordering that a decree be entered in conformity with the prayer in complainant's bill rendered herein on May 14, 1917, to the Supreme Court of the United States; on due consideration whereof it is:

Ordered that said appeal be granted as prayed.

WALTER I. SMITH,
Circuit Judge.

107 (Endorsed:) Filed in U. S. Circuit Court of Appeals Aug. 6, 1917.

108 UNITED STATES OF AMERICA, *ss.*

To Blanton Manufacturing Company, or S. Mayner Wallace, and Shepard Barclay, its attorneys of record, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal, filed in the clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein James J. Brougham and Arthur N. Stankey are appellants, and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellants, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Walter I. Smith, circuit judge of the United States Circuit Court of Appeals, Eighth Circuit, this 4th day of August, in the year of our Lord one thousand nine hundred and seventeen.

WALTER I. SMITH.
Circuit Judge of the United States Circuit Court of Appeals, Eighth Circuit.

Service of the above citation acknowledged this 7th day of August, A. D. 1917

S. MAYNER WALLACE.
SHEPARD BARCLAY,
Attorneys for Appellee.

(Indorsed:) No. 4584. James J. Brougham et al., appellants, vs. Blanton Manufacturing Co. Citation on appeal to Supreme Court U. S. Filed Aug. 8, 1917. E. E. Koch, clerk.

109 *Clerk's certificate.*

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, and full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals, wherein James J. Brougham and Arthur N. Stankey were appellants, and the Blanton Manufacturing Company was appellee, No. 4584, as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

I do further certify that on the twenty-fourth day of July, A. D. 1917, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the judges of the District Court of the United States for the Eastern District of Missouri.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the [SEAL.] Eighth Circuit, at office in the city of St. Louis, Missouri, this ninth day of August, A. D. 1917.

E. E. KOCH.

Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Indorsed on cover:) File No. 26096. U. S. Circuit Court Appeals, Eighth Circuit. Term No. 629. James J. Brougham and Arthur N. Stankey, appellant, vs. Blanton Manufacturing Company, Filed August 16th, 1917. File No. 26096.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

JAMES J. BROUGHAM and ARTHUR N. Stankey, appellants,
v.
BLANTON MANUFACTURING COMPANY. } No. 247.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANTS.

STATEMENT.

This is an injunction suit against officials of the Department of Agriculture charged with the administration of the meat inspection acts and involves the right of the appellee to ship, in interstate commerce, its product under the name of "Creamo Oleomargarine."

The district court sustained the right and enjoined the officials from interfering with it. The Circuit Court of Appeals was divided in opinion, but the majority affirmed the decree.

THE LAW.

The meat inspection acts of June 30, 1906, and March 4, 1907 (34 Stat., ch. 3913, p. 669, and ch.

2907, p. 1260), require an inspection of all meat and meat-food products prepared for interstate or foreign commerce and provide that no person, firm, or corporation shall offer for transportation, and no carrier shall transport in interstate or foreign commerce any such products unless marked "Inspected and passed," and that—

> no such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted. (34 Stat., ch. 2907, p. 1262.)

THE FACTS.

The appellee, or its predecessor, began the manufacture of oleomargarine in 1902 and, at that time, adopted the name "Creamo Oleomargarine" for its product. (R. p. 33.) The reason for selecting this name is shown by the following from the testimony of the president of appellee company (Rec. p. 59):

> Q. Now, in selecting the word "Creamo," what was your purpose in choosing or coining that word?
>
> A. My purpose—at that time the oleomargarine industry was in its infancy. The butter interests were circulating stories to the effect that oleomargarine was produced from sewerage and dead horses. We found it necessary to do something to combat that belief and to convey to the women what the goods were we

have; we must have a term that while not descriptive was suggestive.

Q. Suggestive of what?

A. Suggestive of cream. At that time we were using 30 per cent of cream in those goods, and we wanted to suggest the fact that this was not a dead horse but was a cream product.

Q. And that has been the purpose ever since, hasn't it?

A. Absolutely, ever since.

When the meat inspection act was passed and when the appellee, in 1907, submitted, for approval, its label bearing the name "Creamo Oleomargarine," it was still using cream, and the label was approved. It was then using and has ever since used letterheads on which were conspicuously printed these words:

THE BLANTON COMPANY

CHURNERS OF

Creamo

THE ONLY

FULL CREAM BUTTERINE

The same witness, testifying in March, 1914, explains this letterhead and the reason for its use as follows:

We have used that form the last eight years. That form was originally taken from the cheese industry. At that time we were using a cream

> milk that was full cream, and when you make cheese from a "full milk cream" they call it a full cream cheese. Our competitors at that time were using a skimmed milk, and we wanted to bring out the fact in our literature, as we assumed we had a right to so qualify our goods, that we were using whole cream milk. You don't understand that, because you are not in the cheese business, but that don't mean it is a solid cream and you can pick it up like butter. (Rec. p. 65.)

Subsequently, appellee gave to some of its products the names of "Clover Creme," "Fulcreme" and "Extracreme," but upon complaint of the Department of Agriculture that these names were misleading, they were abandoned. (Rec. pp. 65, 66.)

In 1911, labels bearing the name "Creamo Oleomargarine" were again approved. It does not affirmatively appear whether at that time the product, with respect to containing cream, was the same that it was in 1907 or not. But it does appear that no change in this respect was made for several years after 1907. However, appellee finally abandoned the use of cream and has since used skimmed milk. Its president explains the change by saying that the "Government's milk chemist had discovered that it was not the butter fat in milk which produced the flavor—the flavor comes from skimmed milk, and therefore we could get as much flavor from skimmed milk as whole milk," and says:

> We did not fall into that line until several years after our competitors had fully estab-

> lished the quality of those goods. And it is a well-known fact in manufacturing circles to-day that a good pure skimmed milk will produce as much flavor in a neutral—more so than the milk with the cream in it. The cream being a butter fat, is a substance that decomposes and becomes rancid and, as a matter of fact, better goods can be produced with the scientific use of skimmed milk than can be produced with the use of excessive amounts of cream which decomposes and becomes rancid. (Rec. p. 67.)

A label bearing the words "Creamo Oleomargarine" was again approved about July 6, 1912. (Rec. p. 46.) But, by letter dated August 8, 1912, appellee was notified that the department had concluded that the label conveyed a false inference to the consuming public and should not be used. (Rec. p. 57.) At that time the use of cream had been abandoned and skimmed milk was used instead. (Rec. p. 64.) And the product contained a very considerable quantity of oleo oil and neutral lard. (Rec. p. 56.) Following the notice of August 8, 1912, there was a large amount of correspondence and negotiations, the department insisting that the suggestion of cream in the name was deceptive and the appellee taking the opposite view. In a letter dated May 20, 1913, appellee said:

> If "Creamo" is a trade name and is synonymous with the word "cream," then we are building a business on falsehood and deception, which is neither right nor good business. If, on the other hand, "Creamo" does not spell and necessarily mean "cream," and is not a

> trade name, then we are advised that its use is legal and we are within our rights. (Rec. p. 67.)

The department offered to permit the continued use of the name "Creamo Oleomargarine" if appellee would put on the same label a statement that the product contained no cream. (Rec. p. 68.) It also offered, if the oleomargarine contained not less than 10 per cent of cream, to approve a label bearing the words "Creamo Brand Oleomargarine." (Rec. p. 61.)

No agreement was reached and the appellee continued to use the name "Creamo Oleomargarine." Finally, on February 10, 1914, appellee was notified that the use of the label bearing that name would not be permitted after the following March 1. (Rec. p. 11.) This meant, of course, that the inspectors would refuse to mark the product "Inspected and passed" and it could not be shipped in interstate and foreign commerce. To prevent this action, the bill in this cause was filed.

ACTION OF COURT BELOW.

In the Circuit Court of Appeals, in the majority opinion, it was said:

> We are not desirous of deciding more than is before us and must pass upon the question whether the Department of Agriculture could pass upon and approve a trade name under this last statute, which we find "Creamo Oleomargarine" was and is, and approve it in 1907 and again in 1912, and later, after an

> established business had been built up under that name, and a vast sum of money expended in the business, with or without evidence, change its ruling, and refuse to allow the use of the trade name. (Rec. p. 95; 243 Fed., 507.)

And, after indicating the view that the name was, in fact, not deceptive, the opinion concluded:

> Could the Department of Agriculture approve the use of the label "Creamo Oleomargarine" as provided in the Meat-Inspection Law, and then, after a trade had been built up and extended under that name, and vast sums of money expended in advertising it, change its ruling and forbid its use unless 10 per cent, for instance, of cream was used in the manufacture? We are constrained to say that we do not think any such power was vested in the Secretary of Agriculture.
>
> The decree of the district court was right, and it is affirmed. (Rec. p. 96; 243 Fed. Rep. 503, 508.)

Judge Amidon, dissenting, held that:

> (1) The label in question was false and deceptive.
>
> (2) The finding by the Secretary of Agriculture to that effect is conclusive.
>
> (3) The fact that the Secretary of Agriculture has once approved a label does not prevent his afterwards condemning it if it is afterwards found to be used for false and deceptive purposes.

ASSIGNMENTS OF ERROR.

The assignments of error appear at pages 100 and 101 of the record, and challenge, upon the facts above stated, the correctness of the decree granting an injunction.

BRIEF.

(I)

Since the product in question contains a substantial quantity of oleo oil and neutral lard, it is a meat food product, and can not be shipped in interstate or foreign commerce unless first marked "Inspected and passed." (Rec. p. 56; 34 Stat., ch. 3913, p. 669, and ch. 2907, p. 1260; *Pittsburgh Melting Co.* v. *Totten*, No. 28, Oct. Term, 1918; decided Nov. 4, 1918.)

(II)

The avowed purpose in adopting the name "Creamo Oleomargarine" was to suggest cream as one of the constituents of the product. When, therefore, appellee ceased to use cream the name became false and deceptive, and its use was prohibited by the statute cited above. (Rec. pp. 33, 57, 59, 64, 65, 66, and 67.)

(III)

The determination of the falsity and deceptiveness of a given name as applied to a given product is a question of fact committed by Congress to the Secretary of Agriculture, and his decision is conclusive. (*Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 109; *Burfenning* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 163 U. S. 321, 323; *Johnson* v. *Drew*, 171

U. S. 93; *Gardner* v. *Bonestell*, 180 U. S. 362; *Decatur* v. *Paulding*, 14 Pet. 497; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324; *Marquez* v. *Frisbie*, 101 U. S. 473; *Gaines* v. *Thompson*, 7 Wall. 347; *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40; *Redfield* v. *Windom*, 137 U. S. 636.)

(IV)

If the name in question had, in fact, been false and deceptive when approved by a former Secretary, this would not preclude the present Secretary from making a ruling in accord with the actual facts. (*Fertilizing Company* v. *Hyde Park*, 97 U. S. 659; *Texas & New Orleans R. R. Co.* v. *Miller*, 221 U. S. 408, 414; *United States* v. *Pine River Logging & Improvement Co.*, 89 Fed. Rep. 907, 917; *United States* v. *Lee Wilson & Co.*, 214 Fed. Rep. 630, 651.)

ARGUMENT.

That oleomargarine, as made by appellee, composed largely of oleo oil and the fat of pigs, is a meat food product can now scarcely be the subject of argument. (*Pittsburgh Melting Co.* v. *Totten*, No. 28, October Term, 1918; decided Nov. 4, 1918. It, therefore, can not be lawfully shipped in interstate or foreign commerce unless it is first marked "Inspected and passed" by a Government inspector. It can not be lawfully so marked if offered for sale under a false or deceptive name. It may, however, be offered for sale under an established trade name provided such trade name is one which

is "*not false and deceptive and which shall be approved by the Secretary of Agriculture.*" Waiving, for the moment, the point that whether a trade name is false and deceptive or not is committed by the act to the judgment of the Secretary of Agriculture, the case presents the question, is the name "Creamo Oleomargarine" false and deceptive when applied to appellee's product, which now contains no cream? If capable of serving the purpose for which it was adopted in 1902, it is undoubtedly false and deceptive. We are not left to speculate as to what that purpose was. The president of appellee has frankly stated it. He says it was to suggest cream as an ingredient and to let the women whose trade was sought know that the oleomargarine was a *cream* and not a dead horse product. It may be conceded that when adopted the name was not false and deceptive, for the product actually contained 30 per cent of cream. Confessedly and purposely it then carried the suggestion that the product contained a substantial quantity of cream. The suggestion was not then misleading, because it was true. The name still carries the same suggestion which is emphasized by the use of advertising matter which describes the product as "The only Full Cream Butterine." (Rec. p. 65.) But no cream is used. The suggestion is therefore false and misleading. As an original proposition, therefore, it can scarcely be doubted that, when applied to appellee's product as now made, the name is intentionally false and deceptive.

The majority of the Circuit Court of Appeals, however, made the case turn on the proposition that the Secretary of Agriculture having approved the name was powerless to reverse his ruling and require its abandonment after appellee had spent large sums of money in establishing a business. It is respectfully submitted that the facts present no such question. The real question is, can a manufacturer adopt a name which suggests one of the principal ingredients of his product and lawfully continue to use that name to sell a product which does not contain the suggested ingredient? If the appellee has established a trade by using a name which gives the public to understand that its product is a cream product, has it the right to sell a substitute, containing no cream, under the same name? The purpose of the legislation in question was twofold—to prevent the sale of unwholesome food and to enable the purchaser to know what he is buying. It may be true that the appellee's product is as wholesome as or even more wholesome than it was when cream was used. But one who purchases it believing that there is virtue in cream, as appellee has taught him to believe, is undoubtedly deceived and does not get what he supposes he is buying. If, therefore, the question as to whether the name "Creamo Oleomargarine" as applied to appellee's present product is false and deceptive be treated as now open for determination, there would seem to be scarcely no room for doubt that it is false and deceptive within the meaning of the statute.

However, that question has been foreclosed. The portion of the statute quoted permits the use of such a name only when it is both "not false and deceptive" and "approved by the Secretary of Agriculture." Whether a particular name is false and deceptive is exclusively a question of fact, and its determination has thus been committed to the Secretary of Agriculture. And this Court has said:

> The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing. (*Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 109.)

And this rule has frequently been applied. (*Burfenning* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 163 U. S. 321, 323; *Johnson* v. *Drew*, 171 U. S. 93; *Gardner* v. *Bonestell*, 180 U. S. 362; *Decatur* v. *Paulding*, 14 Pet. 497; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324; *Marquez* v. *Frisbie*, 101 U. S. 473; *Gaines* v. *Thompson*, 7 Wall. 347; *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40; *Redfield* v. *Windom*, 137 U. S. 636.)

When, therefore, the Secretary of Agriculture decided that, after appellee ceased to use cream, the

name "Creamo Oleomargarine" was false and deceptive, his decision was conclusive of that question of fact.

We have seen that the name in question, when approved, was not false and deceptive as applied to the product then being put upon the market. But if the facts were otherwise, the approval of the then Secretary of Agriculture could not preclude his successors, upon a further investigation, from making a ruling in accord with the facts. The police power and the rights of the Government can not be thus impaired. (*Fertilizing Company* v. *Hyde Park*, 97 U. S. 659; *Texas & New Orleans R. R. Co.* v. *Miller*, 221 U. S. 408, 414; *United States* v. *Pine River Logging & Improvement Co.*, 89 Fed. Rep. 907, 917; *United States* v. *Lee Wilson & Co.*, 214 Fed. Rep. 630, 651.) Our view can not be better presented than by quoting from the dissenting opinion of Judge Amidon in the court below, as set out on pages 98 and 99 of the record and reported in 243 Federal Reporter 508, 510, as follows:

> It seems to me too plain for debate that an executive officer appointed to enforce a statute can not by any act or omission of his impair the power of the Government through a subsequent officer to enforce a police statute. To hold otherwise is to give such officers the power to annul the law. It might well happen that the use of a name at the time of its selection, and even for years thereafter, would appear to be innocent, and would be approved in the routine course of administra-

> tive business; then upon a careful investigation it would be found that the name was chosen and was actually used in the channels of trade for false and deceptive purposes. That seems to be what has occurred in the present case. It seems to me an alarming doctrine that the approval of a name which was in effect selected for purposes of deception can destroy the power of the Government to stop the fraud.

It is respectfully submitted that the ruling of the majority of the court below is erroneous and the judgment should be reversed.

WILLIAM L. FRIERSON,
Assistant Attorney General.

JANUARY, 1919.

○

SUPREME COURT OF THE UNITED STATES

October Term, 1918

No. 247

James J. Brougham and Arthur N. Stankey
Appellants

vs.

Blanton Manufacturing Company

Appeal from the United States Circuit Court of Appeals (Eighth Circuit)

STATEMENT AND BRIEF FOR APPELLEE

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(26,096)

Received copy of within brief this March 8, 1919.

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The Trade Label
(Record p. 5)



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Supreme Court of the United States

October Term, 1918

JAMES J. BROUGHAM, *et al.*, *Appellants*

vs.

BLANTON MANUFACTURING COMPANY, *Appellee*

No. 247 (Folio No. 26,096)

Appeal from the United States Circuit Court of Appeals (Eighth Circuit)

STATEMENT FOR APPELLEE

Appellee was obliged to resort to this suit in February, 1914, to enjoin appellants (as officers in charge of the *Bureau of Animal Industry*) from revoking approvals of a trade-mark "Creamo", which approvals had been given it by three Executive Departments. Those officers (threatening to withhold inspection certificates, Rec. p. 79) forbade the use by appellee of that mark upon its packages shipped from St. Louis in interstate commerce, from and after March 1, 1914; before which date appellee obtained a temporary injunction restraining appellants until further order from interfering with the use of the trade-mark in question (Rec. p. 14). The District Court made the injunction perpetual. The Court of Appeals affirmed the decree, in an opinion exhibiting the chief facts of the case (243 Fed. 503). Defendants appealed to this Court.

The Facts

In 1902 (Rec. p. 33) the new word "**Creamo**" had been coined and applied by the predecessor of appellee as a trade-mark on its manufactured goods.

According to plaintiff's evidence, "**Creamo**" is "an arbitrary word, absolutely coined word"; "not in the dictionary" (Rec. p. 44) means "nothing but a distinguishing mark to distinguish our goods from the other goods on the market" (Rec. p. 59). The structure of the word "Creamo" is naturally *suggestive* of cream (Rec. p. 59) which latter word means a superior article or quality of the thing intended, as it may also mean the fatty part of milk. But "**Creamo**" is not *descriptive* of cream in either sense. It is an invented or fancy word (Rec. pp. 35, 44) to designate this manufacturer's product, which is always and only sold under a label bearing the name "*Oleomargarine*", the legal trade-name with which packages of "*Butterine*" and all other substitutes for butter, defined by the special Revenue law on the subject (See our **Appendix A**, p. A 3, for copy; secs. 2, 6) are required to be labeled when sold.

"**Creamo**", as a proprietary mark upon this product, was officially approved both in form and language by the COMMISSIONER OF INTERNAL REVENUE and the Treasury Department, by letter of the former, January 19, 1904 (Rec. p. 29) under *Regulations* (Int. Rev. No. 9, July 1907) which permit manufacturers to put upon their packages some word or other such trade-mark, provided the word "*Oleomargarine*" also appears thereon, "in **close proximity** thereto" "so as to be read as a word in association with such name, word or mark". Those *Regulations* are authorized by

the *Oleomargarine Act* of Aug. 2, 1886, sec. 6 (24 Stat. 209) which require this product to be "*marked, stamped* and *branded* as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe." The appellee's manufacture of its product has been conducted under the inspection of the Internal Revenue Department (Rec. pp. 34, 37) from a time before supervision of the appellee's establishment began by an inspector of the Bureau of Animal Industry, in charge (Rec. p. 54) not long after passage of the *Meat Inspection Law*. Against the latter inspection there was an unavailing protest by appellee, which then claimed (Rec. p. 56) that the Internal Revenue Department had jurisdiction over the marking and branding of oleomargarine because specially charged with the oversight of this product for revenue purposes. Appellee has paid all license and other taxes required by the Internal Revenue Department (Rec. pp. 33-34). No objection has ever been made to the present time (Rec. pp. 42-3) by that Department to the use of "**Creamo**" as a proprietary brand on this product along with the word "**Oleomargarine**", under which trade-name it was always sold. Meanwhile, in 1908, at the suggestion of appellee, there was a modification in the Internal Revenue *Regulations* so as to permit the use of small cartons for prints or bricks of this product, in the packing by manufacturers, "provided such packages" * * * "are marked, stamped or branded as required by the regulations relating to wrapper covering any brick, print or roll of oleomargarine" (Rec. p. 35).

Following approval in 1904 by the Commissioner of Internal Revenue, appellee expended "in publishing

and advertising", to extend the business done under the approved trade-mark, an average of $7,500.00 a year, up to the time of the trial (Rec. p. 43). Before this suit began, the trade-mark "**Creamo**" had increased in value. Several advertising and publishing experts testified, without contradiction, that this mark was worth from $225,000 to a half million dollars (Rec. pp. 72-3) and was growing "more valuable every year" (Rec. p. 72).

After the enactment (in 1906) of the *Meat Inspection* and *Food and Drug Acts* appellee's trade-mark "**Creamo**" on oleomargarine was approved by the Bureau of Animal Industry in the Department of Agriculture at least three times:

1. May 22, 1907 (Rec. p. 31)
2. Again April 28, 1911 (Rec. pp. 40-41)
3. Again July 8, 1912 (Rec. pp. 12, 46)

In each instance the approval was communicated by official letters from officers of the Bureau of Animal Industry. In each instance also those gentlemen first required some minor alteration in the literature of the label, which alteration was accordingly made immediately. In none of those instances was there any suggestion of objection by any official of that Bureau or Department to "**Creamo**" as a trade-mark upon appellee's goods (Rec. pp. 30, 39, 55).

After those approvals by the Treasury Department and later by the Department of Agriculture, appellee applied to the Interior Department (Jan. 6, 1908) for registration of the mark in the Patent Office (under the *Act* of Feb. 20, 1905) and was accorded registration of "**Creamo**" (June 9, 1908) as a "trade-mark for *Oleomargarin*" (Rec. p. 47).

Appellee Offered Every Reasonable Concession

Within a month (Aug. 8, 1912, Rec. p. 57) after a third approval of the mark "**Creamo**" by the Bureau of Animal Industry, officers of the latter began steps to **revoke** the approval (Rec. pp. 52; 85-7; 11) and, incidentally, to **revoke approvals of the mark by the other two Executive Departments**, already described.

Correspondence followed (Rec. 52-3) in which the Bureau officers firmly maintained the position that unless the word "**Brand**" was added to the word "*Creamo*", the use of the latter would be forbidden and appellee's packages (marked "*Creamo Oleomargarine*") would be denied certificates of inspection essential to shipments in interstate commerce (Rec. pp. 52-3; 84-7). Appellee, while protesting that "**Creamo**" did not mean cream, informed the Department (by letter of May 20, 1913, Rec. p. 66) that appellee had "**decided to return to the use of cream in these goods** and make our formula conform to your interpretation of this label". But the Bureau officers were not satisfied with the return of appellee to the use of cream. They began to raise other objections by letters of May 31 (Rec. p. 60), of June 20 (Rec. p. 61) and Oct. 2nd and 31st, 1913 (Rec. pp. 52, 61). Finally by an ultimatum (in letter of Jan. 31, 1914) they refused appellee any use of its mark "**Creamo**" without the word "**Brand**" following, "**in uniform size, style and color of lettering**" (Rec. p. 87) and notified appellee that any use of the "trade label 'Creamo'" would not be allowed after March 1st, 1914 (Rec. p. 79). The evidence and correspondence show that appellee was "willing to do anything to pacify this department" (Rec. p. 68) unless it destroyed

"the whole aspect of the label". Appellee, in order to save its trade-mark by conforming to the Department interpretation of "Creamo" (Rec. p. 66) guaranteed to use **"over ten per cent cream"** (Rec. pp. 67, 87) in its product; but the Department's answer thereto (Jan. 31, 1914) was this (Rec. pp. 63, 87):

> "With reference to the statement 'Over ten per cent cream' you are advised that exception is taken to the word 'Over' in this statement, this being **too indefinite and therefore misleading**. The Bureau will offer no objection to the exact **percentage of cream** being stated on the label in connection with the name *'Creamo Brand Oleomargarine'*.
>
> Approval of the labels is withheld pending receipt of sketches corrected to conform to Bureau requirements and **accompanied by information relative to the** *percentages of the various ingredients* to be employed in the preparation of the products for which the labels are intended.
>
> In view of the length of time which has elapsed since your attention was called to the fact that certain labels, etc., in use at Est. 668 do not conform to Bureau requirements a copy of this letter is today being forwarded to the inspector in charge, St. Louis, Mo., with instructions that on and after March 1, 1914, he prohibit the use of all labels, wrappers, cartons, etc., which do not bear the bureau stamp of approval and number.
>
> Very respectfully,
>
> ACTING CHIEF OF BUREAU."

(The **display type** is ours.)

Appellee's testimony (Rec., p. 63) explains why it "could not comply with that letter":

"He asks us to do something that is a physical impossibility. He asks us to state the exact percentage of cream in these goods. Cream being a liquid, goes into our goods—it is only solids that we can absolutely save; cream being a liquid, going over these goods, it will be impossible for a chemist to take our goods and say, and we couldn't say, whether ten or twelve or fifteen per cent of cream, and we wanted a carton with safety, we wanted to say over ten per cent. In that letter—the idea was to make us say something on that label that would be a physical impossibility for us to sustain; and the whole treatment is so arbitrary that we could not—the whole treatment has been so arbitrary that it is a physical impossibility to comply with the stand that the Department has taken on this matter, an absolute impossibility."

It was further proven by several witnesses that the change of "**Creamo**" to "**Creamo Brand**" in conjunction with the trade name "Oleomargarine" (whose appearance on the label is obligatory) "**in uniform size, style and color of lettering**" (Rec., p. 87) as demanded of appellee by the last command of the Bureau of Animal Industry (Jan. 31, 1914) would ruin the identity and integrity of the trade-mark (Rec., pp. 50, 58, 62) and "destroy its value" (Rec., pp. 72, 73-4). The appearance of the label as used by appellee (Rec. p. 5) will show the force of that practical objection to the change demanded by the Bureau in that label, for a mere glance will demonstrate that the proposed change could not be made, as prescribed, without a total reconstruction of the label.

None of that testimony was contradicted in any particular. On the contrary, the **Answer** filed by de-

fendants (Rec., p. 17) concedes that the Bureau demanded the introduction of the word **"Brand"** into appellee's trade-mark. Defendants allege therein that the Department

> "offered to approve said label modified so as to read **'Creamo Brand Oleomargarine,'** providing said label should be used only upon oleomargarine containing not less than 10 per cent cream" (Rec., p. 17).

That procedure would directly clash with the Internal Revenue *Regulation* on the subject (See **Appendix A**, p. A 6).

Some inference unfavorable to appellee has been sought to be ascribed to stationery (Rec. p. 64) used by it with the caption "**Creamo**", but that was explained fully. It was **not used on or in the packages** sold (Rec. p. 65). The word "*Full cream*" on the **letter-head** was explained, as well as the change at times in the ingredients of the product (Rec. pp. 67-8) along with proof of appellee's efforts to conform to the Department interpretation and demands, to the utmost limit consistent with retaining the trade-mark as previously approved, and for whose introduction and **publicity** in the business world over $75,000 had been invested (Rec. pp. 43, 71) during a period of **eight or ten years.** It was explained that "*Fullcream*" in the dairy industry means cream from which no **milk has been extracted**; and that that name was advertised "at the time that the Government's milk chemist had discovered that it was not the butter fat in milk which produced the flavor"; that "the flavor comes from skimmed milk, and therefore we could get as much flavor from skimmed milk as whole milk" (Rec. p. 67) that "a good pure skimmed milk will produce as much flavor in a neutral—more so

than the milk with the cream in it. The cream being a butter fat, is a substance that decomposes and becomes rancid; and, as a matter of fact, better goods can be produced with the scientific use of skimmed milk than can be produced with the use of excessive amounts of cream which decomposes and becomes rancid; that is the scientific aspect of the question. This aspect of the question has been developed since we established that line of our stationery. We do not like to change our stationery any more than we like to change our labels. Therefore we continued to use it. It is expensive too" (Rec. p. 68). We have quoted the testimony of appellee's President who continued:

> "Q. Did you—in view of the interpretation which the Department had placed, if you had been permitted to use your regular trade-mark, been willing to use at least ten per cent cream?"
>
> "A. We were willing to do anything that would pacify this department. We wanted to comply with all their rules and regulations and at the same time we wanted to maintain our business without any big financial loss. We went down there and made that plea to the solicitor, and told him that to do the thing that his complaints were asking us to do would cause us great financial loss, and if we could maintain the integrity of this label in a way to meet their requirements and at the same time not lose its identity, that we would be only too glad to do so; but that if they wanted us to do impossible things, and change the whole aspect of this label, that we must be shown finally in court; that we could not lose this property without finding out for certain whether it was legal or not" (Rec. p. 68).

That evidence was not contradicted.

After the Department letter of January 31, 1914 (Rec. pp. 62, 87) already quoted, another (February 10, 1914) was addressed to counsel for appellee (Rec. pp. 11, 53, 79) to notify the latter that after March 1, 1914, "the use of that label **would not be allowed**". Then this suit for injunction was commenced.

On those facts the District Court decreed a perpetual injunction as prayed, and the Court of Appeals affirmed the decree.

As we do not find in this Court any formal specification of error, appellee by its counsel can only respectfully submit that **there is no error in the record**, and that the decree should be **affirmed**.

Questions of Law Involved

On the foregoing facts developed by the record in this cause, the question arises whether the Bureau of Animal Industry has the power to destroy the property of appellee in its trade-mark "**Creamo**" and to deprive appellee of its use, in the manner described? The claim of that power by that Bureau is ascribed to the meat inspection law. Appellee denies the power.

Appellee's Points and Authorities

1. Appellee's food product bears the "established trade name" "*Oleomargarine*", prescribed by section 2 of the statute applicable to it (24 Stat. 209). "*Creamo*" is prefixed thereto as a proprietary brand or designation of the product known to the public as "*Creamo Oleomargarine*" since 1902, (many years before the meat inspection law) and sold as an article of food under a label bearing the legend "*Creamo Oleomargarine*" approved by the Commissioner of Internal Revenue of the Treasury Department under the special law conferring power on him to prescribe the marks, stamps and brands on oleomargarine packages for sale. The use of that approved and statutory brand of this product is not "false or deceptive".

U. S. Int. Rev. Reguls. "*Oleomargarine*" (No. 9, July 1907) p. 7, sec. 6; and pp. 40-41
U. S. v. Coca Cola Co. 241 U. S. 286
Sebastian, *Trade Marks* (5th ed.) 753
Weeks v. U. S. 245 U. S. 618
Kerly, *Trade Marks* (1894) p. 475
U. S. v. 150 cases, 211 Fed. 360

2. "*Such*" meat food products as are indicated by sec. 5 of the meat inspection Act **do not include a food product bearing the trade name** "*Oleomargarine*", prescribed by a special revenue law to be used in the sale thereof, and that statutory name is not "false or deceptive" when so used.

Homer v. Collector, 1 Wall. 486
Lung v. Wise, 176 U. S. 156

Moreover, Sec. 6 of the Oleomargarine Act (24 Stat. 209) requires the article to be packed by the

manufacturer in *new* "**wooden** packages", which are not included in the coverings "*can, pot, tin* or *canvas*" specified in sec. 5 of the meat inspection law, nor by the general words following them, because "firkins, tubs or other wooden packages" (of sec. 6 of the Oleomargarine law) are not *ejusdem generis* with the "can, pot, tin or canvas" coverings, but are more conspicuous and important than they, and were known in the federal statutes before the meat inspection law was enacted. The whole of that section should so interpret the last few lines, and exclude an article like this oleomargarine having a "trade name" **by law.**

Pennington v. Cox, 2 Cr. 52
Homer v. Collector, 1 Wall. 302

3. The *Regulations* of the Bureau of Animal Industry (sec. 5) in evidence (Rec. p. 76) support our construction of the meat inspection law by requiring on the trade label "*The true name of the product*" (besides identifying the maker) which true name is "*oleomargarine*".

4. The Department *Regulation* No. 17, for labels on mixtures under the meat inspection law expressly applies to such products "*other than oleomargarine*", and so excludes the latter from their operation and effect.

U. S. Reguls. B. A. I. Order 211, "*Meat Inspection*", Reg. 17, Sec. 9, paragraph 8, p. 46.
(See our **Appendix A**, p. A 5.)

5. The *Food and Drugs Act, in pari materia*, enacts that "an article of food" containing no poisonous or

deleterious ingredients **shall not be deemed misbranded:**

> "First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced."

This "*Oleomargarine*" bears that statutory trade-name when sold, is an article of food, and is distinctly within that description, and hence should not be considered misbranded.

> **U. S. v. Coca Cola Co. 241 U. S. 286**
> Sebastian, *Trade Marks* (5th ed.) 367

6. No power or authority is conferred by law on the Bureau of Animal Industry to **revoke approval** of a trade-mark for oleomargarine already approved by the Bureau. That power is not incidental to the power of *approval.*

> McCormick v. Aultman, 169 U. S. 609
> Reeside v. U. S., 8 Wall. 43

7. No power or authority is vested in the Bureau of Animal Industry to revoke approval of a proprietary mark approved by the Commissioner of Internal Revenue for use on oleomargarine packages for sale, under the Regulations of the latter specially applicable to that food product; nor to revoke the approval given to the trade-mark by its registration

as such in the Patent Office in the Interior Department.

Parkhurst v. U. S. 29 Ct. Cl. 399
Case v. Quirk, C. D. 1908, 221 (222)

8 After approval of appellee's trade-mark and brand by the Treasury and Interior Departments and the Department of Agriculture (on three occasions from 1907 to 1912) its use for more than ten years, and expenditure of large sums of money in its extension and advertisement, it was not competent for the Bureau of Animal Industry to destroy the property value of this trade-mark by requiring **a change in the language of it**, under penalty of withholding the certification for interstate commerce. The change ordered conflicts with the Internal Revenue *Regulation* which requires the word "oleomargarine" to appear on the label "in close proximity" to the brand if one is used. (See our **Appendix A**, p. A 6.)

9. The approval of the trade-mark or brand by the Bureau cannot properly be cancelled or revoked by a different administration, in such circumstances as here appear.

U. S. v. Stone, 2 Wall. 535
Ballinger v. U. S. 216 U. S. 240
Illinois v. U. S. 20 Ct. Cl. 349

10. The word "*Creamo*" is a valid, original, invented trade-mark, as applied to the food product sold by appellee.

In re Williams, 86 L. J. Ch. 273
Price Co. v. Fyfe, 45 Fed. 800
Kerly, *Trade Marks* (1894) 152 3
Hopkins, *Trade Marks* (3d ed.) p. 142
Lauferty v. Wheeler, 11 Daly 194 (11 Abb. N. C. 220) "*Alderney*" oleomargarine ("Club soda") Cochrane v. Macnish (1896) A. C. 225

11. The fact that such a fanciful, arbitrary, original word as "Creamo" on oleomargarine, adopted as a trade-mark, is *suggestive* of something attractive is no sound objection thereto if the word is neither *descriptive* nor *generic*, as in this case.

("Koffio") Sleepy Eye Co. v. Blanke, C. D. 1898, 662
Penn. Salt Co. v. Myers, 79 Fed. 90
Fairbank Co. v. Lard Co. 64 Fed. 136
Bennett v. McKinley, 65 Fed. 505
Hopkins, *Trade Marks* (3 ed.) pp. 95-6; 194-5

12. The discussions upon some trade-marks are persuasive in their bearing upon ours.

("Corno" feed) U. S. v. Carload, 188 Fed. 453
("Magico") *Ex parte* Am. Chem. Co., C. D. 1893, 16
"Oxo" Ltd. v. King, 34 R. P. C. 165
("Solio") Eastman Co. v. Compt. Gen. (1898) A. C. 571
In re Linotye Co. (1900) 2 Ch. 238
("Marvo Margarine") Tanner v. Dyball, 94 L. T. 538
"Cream" Yeast Powder case, 5 Sawy. 584
"Creamalt" bread, Fox Co. v. Glynn, 191 Mass. 344
"Cream of Wheat," *Ex parte*, 9 Gourick Dig. 74
"Jersey Cream baking powder," 4 Ont. L. R. 301
"Cream rolled oats" (Albers) 171 Fed. 989

13. After appellee decided, in May 1913, to return to the use of cream in its "Creamo" (Rec. p. 66) to satisfy the unreasonable demand of the Bureau, the latter then insisted on appellee's changing the lan-

guage of its trade-mark (Rec. pp. 62, 87) as previously used for more than ten years and approved by three Departments. In those circumstances appellants (as officers of the Bureau of Animal Industry) being without lawful authority to make or enforce such order in the way attempted, **injunction was the appropriate remedy** to protect appellee's property right in the trade-mark from impairment and injury; and appellee has first done all that equity required of it before invoking that remedy.

Menendez v. Holt, 128 U. S. 514
Jacobs v. Beecham, 221 U. S. 263
Moxie Nerve Food Co. v. Modox, 153 Fed. 487
Gaines v. Turner Co. 204 Fed. 553
Diamond Salt Co. v. Worcester Co. 221 Fed. 66
Simmons Co. v. Drug Co. 93 Tenn 84 (23 S. W. 165)
("Club soda") Cochrane v. Macnish (1896) A. C. 225
38 Cyc. 733

14. Before this suit was brought appellee had made more concessions, in respect of its right to manufacture this food product under the trade-mark "Creamo" on oleomargarine than law or equity required; and the final demand of the Bureau (as expressed in its letter of Jan. 31, 1914, Rec. pp. 62, 87, and in its *Answer* to this suit, Rec. p. 17) for a change in the language of appellee's trade-mark to **"Creamo Brand"**, was unauthorized and a proper subject for the injunctive relief decreed by the District Court.

Noble v. Logging Co. 147 U. S. 165

BRIEF OF THE ARGUMENT FOR APPELLEE

We shall abbreviate as much as possible the discussion here but will submit herewith, as **Appendix B,** the brief for appellee in the Circuit Court of Appeals, as part of our argument for consideration by your Honors, in the event our summary prepared for this Court may appear in any respect inadequate. We also submit in an **Appendix A** some excerpts from statutes and *Regulations* which may be appropriately presented in that way for ready reference.

The evidence in the record of the steady growth and present value of the appellee's business, done under this trade mark (Rec. pp. 50, 72-3) gives sufficient warrant for our anxiety to have your Honors become fully acquainted with every phase of the facts involved. We believe appellee has acted in good faith in the choice and use of this trade mark, and that the pretense that it is "false or deceptive", under any law, is an arbitrary, fanciful and strained afterthought without adequate support.

Our **Points and Authorities** exhibit in short compass the law on which we rely. Our argument will be condensed into the following sections:

1. General view of the controversy
2. The statutory powers governing such marks
3. The nature of this trade mark
4. The remedy applied

We should rejoice did we possess the ability to treat this case with such unique brevity as distinguishes the learned Brief for appellants. But we do not. Appellee has found the labors of many years

challenged as deceptive and fraudulent, and the results of long toil and earnest efforts to build up a legitimate business threatened, not by some infringing competitor but by one of the Bureaux of the Government. So appellee is bound to attempt to inform this high Court fully of the circumstances of the case, and its counsel would deem themselves derelict in their duty if any material feature of the record should not be brought to the attention of your Honors.

I

A General View of the Controversy

The word "**Creamo**" to distinguish the oleomargarine made by appellee, was used on the label of its packages and enjoyed as a trademark by appellee and its predecessor for more than ten years, with the approval of the Internal Revenue Department, the Interior Department (of Trademarks) and the Department of Agriculture. It appeared as a brand on its trade product "*Oleomargarine*". Under the close inspection and supervision of those executive Departments, appellee had built up a large and expanding business. Suddenly, in August, 1912, the officers of the Bureau of Animal Industry announced their idea that the label on this proprietary food product was "misleading" or "deceptive", although it had been sold for more than ten years under the brand of "*Creamo Oleomargarine*", so advertised to the public meanwhile at an expense averaging $7,500 yearly, and had never been otherwise questioned by any competitor or any officer of the other Departments. A long correspondence ensued. The Bureau officers claimed (despite the

provisions of the Food and Drugs Act and those of the oleomargarine law) that "**Creamo**" meant cream. They took the position that appellee **must put the word** "Brand" into the trade mark and use cream in making its product. After some dispute (in May, 1913) appellee decided to return to the use of cream to satisfy appellants, although the research department of the Government had demonstrated that **skimmed milk was for several reasons** (Rec. p. 67) better than cream (which had been formerly used) to impart a desirable flavor to oleomargarine. But appellants were not satisfied with appellee's return to the use of cream in his formula for "Creamo Oleomargarine", or with his guaranty to use at least 10 per cent thereof in the product. They continued to insist on a radical change in the label to introduce the word "Brand" in "**uniform size, style and color of lettering**" (Rec., pp. 62, 87) and with that demand (Jan. 31, 1914) ordered him to comply before March 1, 1914, under penalty of withdrawal of the certification necessary for interstate commerce —which meant, of course, the business death of "**Creamo Oleomargarine**". The merits of that invented word "**Creamo**" as a trade mark we will discuss further on. At present we call attention to the fact that we have here no question of infringement, but only issues which arise under the Bureau interpretation of federal legislation. Appellee contends that this is a food product, known by its trade name "Oleomargarine", that the able Bureau officers have no authority to revise the statutory label by rejecting the Internal Revenue *Regulation* which requires a trade-mark to appear thereon "in *close proximity*" to "*oleomargarine*" (See our **Appendix**

A, p. A 6,) under which regulation, appellee's brand has been expressly **approved** by the latter Department (Rec. p. 29). In no aspect of the facts should this product be held *misbranded*. (See our **Point** 5, and cases cited.)

Let us quote a very great Judge (Mr. Justice HUGHES) on one aspect of this subject:

> "A distinctive name is a name that distinguishes. It may be a name in common use as a generic name, e. g., coffee, flour, etc. Where there is a trade description of this sort by which a product of a given kind is distinctively known to the public, it matters not that the name had originally a different significance. Thus, soda water is a familiar trade description of an article which now, as is well known, rarely contains soda in any form. Such a name is not to be deemed either 'misleading' or 'false', as it is in fact distinctive."
>
> United States v. Coca Cola Co., 241 U. S. 286

The learned author of that quotation had before him a case arising under the Food and Drugs Act, but the requirements of the Bureau *Regulation* 20 (p. 9) under that law are substantially the same as, if not more drastic than those against trade names "false or deceptive" in section 5 of the meat inspection law. This also appears in the able discussion found in a later decision of this Court explaining the law of misbranding in a most lucid and clear opinion.

> Weeks v. U. S., 245 U. S. 618

Those two statutes, the meat inspection law and the food and drugs act, are *in pari materia;* and when it comes to brands and distinctive or proprietary names for food products, we respectfully submit that all the statutes concerning the article of

food or food product involved should be considered, in construing the meaning of any of them. (See decision cited to our *Point* 2.)

When appellee found that its return to the use of cream would be unavailing to satisfy the Bureau officers, and that even that undesirable change of its business formula would not suffice without the mutilation of this trade label, and a specification thereon of the "exact percentage of cream" (Rec. pp. 63, 87) it was obliged to resort to the court for injunctive relief against the final order of the Bureau (Jan. 31, 1914) just quoted. That ruling of the Bureau was but an attempt to fix the standard of quality of "Creamo" and beyond the powers of the Bureau under the law.

U. S. v. Butter, 188 Fed. 157

Such Bureau attempts to regulate beyond the powers in the statutes are void.

Morrill v. Jones, 106 U. S. 466
U. S. v. Boeckman, 176 Fed. 382

The interference by the Bureau with the use of this trade-mark amounted to an attempt to revoke the approval of the mark by that department, and of two other executive Departments, the legality of which attempt appellee denies, and cites the decisions to our **Points** 6-9 to express our position.

The fact that oleomargarine was never intended to be questioned as a good "trade name" under the meat inspection law is manifested by the *Regulations* of the Bureau as to mixtures. They **expressly exclude oleomargarine.**

"Regulation 17, **Labeling**" (1914), sec. 9, paragraph 8. (See copy in our **Appendix A**, p. A 5)

We have not repeated all the facts in this sum-

mary. They appear fully in this Brief; but on them under the principles we have stated in our *Points* above, we respectfully submit that the decrees below should be affirmed.

II

The statutory powers governing such marks

The Bureau of Animal Industry rests its appeal to this Court on three assumptions, all of which are groundless.

> 1st. The Bureau starts with the false assumption that "Creamo" and "cream" are one and the same word.
>
> 2nd. That a registered trade mark or brand is the name (or a part of a name) usual to meat or meat-food products.
>
> 3rd. That appellee to retain its property right in the trade mark or brand must conform its formula to the Bureau assumption that "cream" and "Creamo" are one and the same.

(a) There need be little discussion of the first assumption. It should be plain that there is a difference in the two words even to those who may run while they read. It should be sufficient to say that "cream" is a word that could not be registered as a trade mark. Under the oleomargarine regulations of the Internal Revenue Department, it would not be approved as a proper brand. If "**Creamo**" was an established trade name "usual to such" (food) "products" it would be found and defined in the standard dictionaries.

(b) As to the second assumption: that a registered trade mark or brand is the name or part of a name

"usual to such" (meat or meat food) "products" as are mentioned in the first part of section 5 of the meat inspection law, it is most earnestly submitted that a careful reading of that law will disclose that Congress has restricted the Bureau of Animal Industry to much narrower limits than contended by learned counsel for the Government. That law declares that no **such** meat or meat-food products shall be sold or offered for sale under "false or deceptive" trade names. The question naturally arises, what is the trade name of the product in question? We insist that the name of the product with which the Bureau of Animal Industry is concerned under the meat inspection law is wholly and solely "**Oleomargarine**". By the Act of August 2nd, 1886 (known as the Oleomargarine law) Congress has described a certain food product and given it the name "Oleomargarine". A reference to Section 6 of the Oleomargarine Law shows that Congress took into consideration the marking and branding of that product, and charged the Commissioner of Internal Revenue (subject to approval by the secretary of the Treasury) with the duty of prescribing by Regulations those **marks** and **brands**. He has done so. (See Oleomargarine Regulations No. 9, Revised July, 1907; and copy in our **Appendix A**).

In keeping with Section 6 of the law and those Regulations the word "**Creamo**" has been approved by the Commissioner (Rec. p. 29) as a proper brand or trade-mark for appellee's oleomargarine.

Had "Creamo" been the "trade name" of the product or a part of the name of the product, it would not have been approved by the Commissioner of Internal Revenue under the oleomargarine law and regulations. These *Regulations* provide that no device

or brand shall be printed on any print or roll of oleomargarine in any statutory package unless the word "*Oleomargarine*" is also impressed thereon. The *Regulations* further provide that under no circumstances will any manufacturer be permitted to impress or brand upon any print or roll of oleomargarine (or any wrapper covering the same) any device, word, or words calculated to induce the public to believe that it is the product of the dairy or butter, even though the word "oleomargarine" appears on the same. So the ruling of the Internal Revenue Commissioner approving the "**Creamo**" label is his decision that the present contention of the Bureau of Animal Industry is groundless.

It should also be borne in mind that appellee registered in the United States Patent Office the word "**Creamo**" as a suitable "trade-mark for oleomargarine" under the law of 1905 (Rec. p. 47). It is part of the law and of the duty of the Department of Trade-marks to reject from registration any proposed mark which is either deceptive, descriptive or not original, and to co-operate with the other Departments in its action (34 Stat. 168; 35 Stat. 627).

Ex parte Barclay, C. D. 1905, 174
Levy & Co. v. Uri, C. D. 1908, 461

The registration of "**Creamo**" as appellee's trade-mark was in June 1908, after the approval thereof by the B. A. I. as well as by the Treasury Department.

It is respectfully submitted that when two executive Departments of the Government, with special powers over oleomargarine brands and trade-marks, have formally approved this brand and mark as being proper, those approvals necessarily preclude and bar the claim that "Creamo Oleomargarine" is an estab-

lished trade-name, or a name which is "usual" to meat or meat-food products, within the meaning or intent of the meat inspection law.

The Commissioner of Internal Revenue could not or would not, under the oleomargarine law, approve a word which was the trade name of the product. It should be plain that when Congress said a certain product was to be specified and marked as "Oleomargarine" appellee would have no authority to change the Act of Congress by arbitrarily adding or subtracting something from the name so designated. It should also be plain that had the word "**Creamo**" been the trade name of a product, the United States Patent Office would not have registered it as a trade-mark.

The meat inspection act provides that no *such* meat-food products (as are referred to in section 5) should be sold in interstate commerce under any false or deceptive name. Under that law, Oleomargarine could not be shipped and sold as butter; lard compounds as lard; mutton tallow as oleo oil; hog livers as beef livers; or beef sausage as pork sausage. Those are established "trade names", with which the meat inspection law is concerned. But when it comes to brands on oleomargarine, which are private property, two executive Departments above mentioned are vested by law with special powers in no way conflicting with or touched on in the meat inspection law. We have noticed with interest that part of the learned brief for appellants (p. 12) which contends that where a decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive. Our claim is that the heads of two execu-

tive Departments, specifically charged by special laws governing, severally, oleomargarine brands and trade-marks, have passed on and decided that appellee's "*Creamo*" brand and mark were proper when used on oleomargarine. Who may justly maintain, under the special oleomargarine law, that the Commissioner of Internal Revenue has powers on oleomargarine brands subsidiary to those of the Bureau of Animal Industry? Who may justly maintain, under the general meat inspection Act, that the chief of that Bureau can cancel or prevent the use of a trade-mark, duly considered, approved and registered under the powers conferred by the trade-mark Act of 1905?

We have found no authority in any law to authorize the Bureau of Animal Industry to revoke the approval of "Creamo" by the three Departments, in the manner attempted in this case and many rulings to the contrary. (See decisions under our **Points** 6-9.)

(c) The third assumption of the appellant is that appellee, to retain its property rights in its trade-mark or brand, must conform its formula to the fallacy that "*cream*" and "**Creamo**" are one and the same word. The appellee has been frank to admit that it varied its formula for making its "**Creamo**" brand of oleomargarine from time to time. It is further in evidence that better oleomargarine can be produced without cream and that at one time such a product has been sold (Rec. p. 88). It is further in evidence that plaintiff wrote the Bureau of Animal Industry (May 20th, 1913, Rec. p. 66) that it had decided to return to the use of cream in these goods "and make our formula conform to your interpretation of this label." Notwithstanding this fact the

Bureau of Animal Industry was not satisfied but imposed the impossible condition of mutilating the established brand or trade-mark by inserting a new word **"Brand", "in uniform size, style" and coloring** (Rec. p. 87) which would destroy the established property value of the trade-mark, as the evidence shows (Rec. pp. 72-3).

It is further in evidence (Rec. p. 86) that the Chief of the meat inspection Bureau, under date October 27th, 1913, refused appellee the right to use its trade-mark, notwithstanding appellee offered to set out a statement in connection therewith that said brand "Creamo" was a registered trade-mark.

The record is plain that, while the appellee denied the legal authority assumed by the Bureau of Animal Industry, it was desirous to meet any reasonable or even extreme interpretation of the meat inspection law, hoping all the while to be able to maintain the integrity of its brand and trade-mark.

To sustain the contention of appellant that trade-marks are subject to cancellation on account of changes in the formula of the product would lead to untold confiscation of property rights involved under the trade-mark law. Is it possible for a collateral executive Department to wipe out property rights conferred by a duly registered trade-mark, to say nothing of a brand approved by the Commissioner of Internal Revenue under the special powers conferred by the oleomargarine law?

Reading together all the laws regarding brands of food articles, it seems to us that the attempt of the Bureau to regulate the formula of "*Creamo Oleomargarine*" is directly in conflict with the principles expressed in them, and in recent decisions of the

courts; and that in the case at bar the ultimatum of the Bureau officers, January 31, 1914, was beyond their powers.

U. S. v. Coca Cola Co. 241 U. S. 286
Weeks v. U. S. 245 U. S. 618
U. S. v. Butter, 188 Fed. 157
St. Louis Packing Co. v. Houston, 215 Fed. 553
Armour & Co. v. Bird, 159 Mich. 1

Although oleomargarine is still defined as a fat obtained from cattle (6 Century Dict., 1911, p. 4101) sec. 2 of the Act of 1886 shows that it has developed to a mixture of fats; and this record discloses (p. 88) that the largest factory in the world "produces a strictly vegetable oleomargarine without any animal fat whatever". Yet the Act of Congress keeps the same trade name on it, and defines it as in section 2 (for which see our **Appendix A**). Milk or cream has been "*churned*" with the other ingredients, as part of the regular process of its manufacture to give the article a flavor.

Wiley, *Foods* (1907) p. 189

See "Meat Inspection" *Regulation* 18, sec. 5, parag. 3 (in our *Appendix A*, p. A5) which shows that milk or cream is generally used "in the manufacture of oleomargarine".

But skimmed milk has proven better than cream to flavor the product, because the fat in the cream decomposes and becomes rancid sooner than if milk be used, as the record explains (p. 67). Now the regulation of the formula of this food product has not been committed as yet by federal law to the Bureau of Animal Industry, and in the present state of development, we respectfully submit that the courts below were right in holding that the ultimatum of the

learned officers of the Bureau, Jan. 31, 1914, were in excess of their authority, to say nothing of its direct conflict with the *Regulation* of the Treasury Department placing every trade-mark "in close proximity" with the word "oleomargarine". (See **Appendix A**, p. A 6.)

III

The nature of the trade-mark "*Creamo*" on *Oleomargarine*.

We regard other facts already given at some length as furnishing ample ground for the decree below. Yet the nature of the trade-mark in question has a bearing upon the general equities of appellee's position, and cannot well be slighted, especially as the attitude of the learned officers of the Bureau of Animal Industry appears deeply tinctured with the impression that the appellee's mark is merely **descriptive** or generic, means "cream", and as such is deceptive. Appellee claims that it is an original, invented, fancy, arbitrary, coined word, merely intended to distinguish the oleomargarine of appellee's manufacture from others, and to be used on brands or labels for "Creamo Oleomargarine" as an article of food under whatever formula the maker might use, so long as it contains no "poisonous or deleterious ingredients".

It is no new proposition that, as an element of attractiveness, a suggestion is a sound starting point on which to build a coined word. A high authority, referring to the word "*Magico*", as not infringing the word "Magic", as a trade-mark, said that a "newly coined word brings with it such an element of novelty as to itself attract attention and prevent confusion in the minds of ordinary purchasers"

Ex parte Am. Chem. Co. C. D. 1893, 16 (17)
Penn. Salt Co. v. Myers, 79 Fed. 90
(Other decisions under our **Point** 11.)

In the case at bar the word "**Creamo**" is obviously intended **not to be** "cream"; yet it is, of course, suggestive of cream, the idea of which in our language is not only associated with the fatty part of milk, but with excellence or "the choicest part" of anything, according to all the standards of our vernacular. The appellee's President, after describing "Creamo" as an "arbitrary", "coined word" (Rec. p. 44) said that it "while not *descriptive* was suggestive" of cream, and was originally a cream product (Rec. p. 59). But that did not bind appellee always to use cream in its formula, because of the trade-mark "Creamo".

The result of the appeal does not depend on this issue, for the alert officers of the Bureau in their ultimatum which appellee felt to be the last "straw that broke the camel's back" (Rec. p. 62) demanded much more than the use of cream in place of milk to flavor its product. They required the trade-mark to be altered in form and in language; and the **exac** **percentage** of cream to be "**stated on the label** in connection with the words 'Creamo Brand Oleomargarine'" (Rec. pp. 63, 87) under penalty of refusal to certify the product for interstate shipments, after March 1, 1914. That demand we have not as yet seen any law cited which sustains. But the nature of the trade-mark itself, properly appreciated, will demonstrate more clearly how far astray the learned officers of the Bureau have wandered from the principles of the law of trade-marks on which so many valuable rights in the world of trade depend. A trade-mark often represents a large value; and when it does, that value depends on that delicate asset: good will, which experience demonstrates to be very

sensitive to the effect of any change in the object which attracts the old trade. It is not only of common knowledge but in evidence that such a change in the trade-mark in this case as the learned Bureau officials demanded, by their letters (the last of Jan. 31, 1914) would "make it foolish, ludicrous and absolutely destroy its value as a trade-mark" (Rec. pp. 72, 73).

The circumstance that "Creamo" bears an attractive suggestion is an argument in its favor. It does not make the word descriptive or generic. It adds to its value as an invented word and veritable trade-mark. (See decisions cited to our **Point** 11) Such suggestion, when not descriptive or generic, is no blemish to the mark. Many of the most valuable and popular trade-marks are suggestive, yet the public understands them as marks of ownership only. We doubt if anyone outside the Bureau of Animal Industry ever supposes that there are any pearls in "*Pearline*" (an article well known by its trade-mark) or that there is any "**Nigger Hair**" in the smoking tobacco sold under that mark

Leidersdorf v. Flint, 50 Wis. 401

Or real "**Gold Dust**" in the washing powder so named

Fairbanks Co. v. Luckel Co., 102 Fed. 327

Or any cream in "Cream of Wheat"

Ex parte Cream of Wheat Co., 62 MS D. Oct., 1897 (9 Gouriek Dig. 74)

Or in "Cream" Baking Powder

Price Co. v. Fyfe, 45 Fed. 799

Food Co. v. Powder Co. 37 App. (D. C.) 137

Or in "*Jersey Cream*" cornmeal

Ex parte Dahnke-Walker Co. 133 O. G. 1423

Or in "*Cream Acid Phosphate*"
U. S. v. Bbls., "Food and Drug Decisions" (1906, Gwinn) p. 212
Or in "Creamalt" bread
Fox Co. v. Glenn, 191 Mass. 344 (78 N. E. 89)
Or any cedar in "Cedarine" furniture polish
Allen v. Walker, 235 Fed. 230

Those are merely types of a class of trade-marks which deceive nobody, and yet have a fetching suggestion that brings business.

The trade-mark "Ivory" as applied to soap has been long known and recognized as valid.

Goodwin v. Ivory Soap Co., 18 P. R. 389

Yet we suppose no one beyond official circles of inspection would ever imagine that that soap was composed entirely of ivory. When it was first manufactured and put upon the market it was of a somewhat yellow tint resembling ivory in color. The name is suggestive of ivory, but, since it originated, by improved processes of refining vegetable oils it is now made white. Yet we suppose no Court would permit any Department to withdraw from the owner on that account any property rights in that valuable trade-mark because of the change in the process of manufacture. The same principles apply to our brand. The history of the discovery of oleomargarine as a food, and an economical substitute for butter, and of its improvement by experience, indicates that the ingredients of that product are constantly subject to change. Sec. 2 of the Act of Congress concerning it assumes that fact (See our **Appendix A**, p. A 3.) From animal fats used at first, some of the best improved methods now approve strictly vegetable fats used by

some manufacturers. The original invented trade-mark **"Creamo"**, to designate appellee's "make" of statutory "oleomargarine" (popularly known otherwise as "*butterine*") should not be held, we respectfully submit, to be a barrier to the maker's right to improve its formula in the development of its manufacture, as scientific progress may require.

The decisions cited to our *Points* 10, 12 should be consulted in case of any doubt as to the validity of "Creamo" as a trade-mark. We respectfully claim that it is valid and should be sustained.

IV

The Remedy Applied

Before this suit was brought, the appellee made every effort to conform to the Bureau demands, deciding to return to the use of cream in the make-up of its product (Rec., p. 66) and in other ways already described. If there was ever any error in changing its formula from cream to skimmed milk for the betterment of the product (Rec. p. 67) the error was corrected so far as concerned appellants by the acts of appellee after the Bureau officers began to complain in August, 1912. From that time until the appellants' ultimatum (Jan. 31, 1914) appellee, making every reasonable concession short of mutilating the trade-mark itself, found the Bureau officers more and more inflexible in their demands for an **entire change** in the language of the label and for specification thereon of "the exact percentage of cream" used in the manufacture. To that length appellee declined to go. The decisions cited to our **Points** 13, 14 we hope will be found to declare principles which justify ap-

pellee in applying to a court of equity for the remedy which was accorded it to safeguard its trademark, of whose large value appellee would otherwise have been deprived, with very scant observance of the usual methods which belong to due process of law.

In Conclusion, we ask pardon for the length of our argument, induced only by our earnest wish to leave no feature of the case uncertain. The carefully considered opinion of the learned Circuit Judges of the Court of Appeals will receive from your Honors that attention which it so justly merits. If we have not obscured the large equities of appellee upon the undisputed facts by elaborating the details too much, we shall be glad. We are firmly convinced that appellee has acted in good faith, and that the decrees below should be affirmed.

S. Mayner Wallace
Shepard Barclay
Solicitors and of Counsel for Appellee

St. Louis, Mo., March, 1919

APPENDIX A

Supreme Court of the United States

James Brougham, et al.
Appellants
vs
The Blanton Company
Appellee

Folio No. 26,096

APPENDIX A

For the convenience of the Court we reprint several excerpts from statutes and department Regulations referred to in the Briefs

Statutes

Section 5 of the **Meat Inspection** law:

"(5) That when any meat or meat food product prepared for interstate or foreign commerce which has been inspected as hereinbefore provided and marked 'Inspected and Passed' shall be placed or packed in any can, pot, tin, canvas, or other receptacle or covering in any establishment where inspection under the provisions of this act is maintained, the person, firm, or corporation preparing said product shall cause a label to be attached to said can, pot, tin, canvas, or other receptacle or covering, under the supervision of an inspector, which label shall state that the contents thereof have been 'Inspected and Passed' under the provisions of this act; and no inspection and examination of meat or meat food products deposited or inclosed in cans, tins, pots, canvas, or other receptacle or covering in any establishment where inspection under the provisions of this act is maintained shall be deemed to be complete until such

meat or meat food products have been sealed or inclosed in said can, tin, pot, canvas, or other receptacle or covering under the supervision of an inspector, and no such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted."

From the **Food and Drugs Acts**

Sec. 8. "That the term "misbranded", as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this Act an article shall also be deemed to be misbranded:

* * * * * * *

In the case of food:

* * * * * *

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to

be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced. (34 Stat. L. 769.)

Fed. Stat. Annot. Supp. 1909, p. 139, 140.

From the **Oleomargarine** law

Section 2, act of August 2, 1886:

"That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine', namely: All substances heretofore known as oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef-fat, suet, lard, lard-oil, vegetable oil, annotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter."

Section 6, act of August 2, 1886:

"That all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs, or other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked,

stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all sales made by manufacturers of oleomargarine, and wholesale dealers in oleomargarine shall be in original stamped packages. Retail dealers" * * * etc.

Department Regulations

Bureau of Animal Industry (1914)

Reg. 17. **Labeling.**

"Section 8. A meat food product when composed of more than one ingredient shall not bear a label with a name stating or indicating that the product is a substance which is not the principal ingredient contained therein, even though such name be an established trade name. The term 'principal ingredient,' as used in this section, shall be construed to mean that such ingredient is equal to or exceeds in amount the other ingredients combined, exclusive of cereal and water. If the ingredients are stated on the label, they shall appear in the order of their percentages. For example, sausage containing pork and beef shall not be labeled 'pork sausage,' but shall be labeled 'pork and beef sausage.' However, if the pork ingredient equals or exceeds 50 per cent of the meat content, the sausage may be labeled 'pork sausage, beef added.' A product consisting of veal, pork and beef shall not be labeled 'veal loaf,' but may be designated as 'veal, pork, and beef loaf.' However, if the veal ingredient is not less than 50 per cent of the meat content of the product, the product may be labeled 'veal loaf, pork and beef added,' the words

'pork' and 'beef' to appear in the order of their percentages, as above indicated'' (p. 45).

* * * * * * *

''*Paragraph* 8. Labels for mixtures, **other than oleomargarine**, consisting of fat derived from carcasses of cattle, sheep, swine, or goats and any vegetable oil, shall bear the names of the ingredients in a prominent manner, in the order of their percentages, preceded by the statement 'composed of,' or 'made from,' or an equivalent statement. Tierces and barrels containing 'compound,' or 'lard substitutes,' or 'lard compound,' shall, immediately after filling, be legibly marked on one end, and on the side near the end, with the true name of the product. Tin pails, drums, tubs, and similar containers of such products shall bear the true name of the product also on the side at the time of filling'' (pp. 46-47).

Reg. 18. *Preparation of Meat and Products* Section 5.

* * * * * * *

''*Paragraph* 3. Pumps, pipes, conductors, and fittings used to conduct milk, cream, or mixtures of milk or cream in the manufacture of oleomargarine shall be of sanitary construction, with smooth inner and outer surfaces of noncorrosive material or coated with nickel, tin, or other approved material, readily demountable for cleaning, and shall be kept clean and sanitary'' (p. 50).

Regulation 26.

''Section 1. Inspected and passed meat and products, like uninspected meat and products, shall comply with the provisions of the food and drugs act in every respect. Failure to comply'', etc. (p. 69).

Regulations (Oleomargarine, 1907)

(Internal Revenue Department)

"Manufacturers are permitted to pack prints, bricks, and rolls of oleomargarine in statutory packages, subject to the following restrictions:

I. No device or brand shall be imprinted upon any brick, print, or roll of oleomargarine packed in any statutory package unless the word 'Oleomargarine' is also impressed thereon in letters equal in size to those used in expressing any brand or word used by the manufacturer. When no display is made except a device, then the word 'Oleomargarine' shall be impressed on such brick, print, or roll in letters not less than one-fourth of an inch square, and in all cases the word 'Oleomargarine' shall be equally displayed with any brand or word used by the manufacturer, in close proximity thereto, and on the same surface of such brick, print, or roll.

* * * * * * *

III. Manufacturers will be permitted to impress upon their rolls, prints, or bricks marks or embellishments in the way of a finish for the same, without the word 'Oleomargarine' appearing thereon, provided said marks or embellishments are first presented in duplicate photographic copies, serially numbered, to this office for approval. The wrappers for these rolls, prints, or bricks may be in blank; but if any mark, device, or brand is used, the word 'Oleomargarine' must appear in letters one-fourth of an inch square and in close proximity thereto and on the same surface of each brick, print, or roll. The

practice of placing the word 'Oleomargarine' on the wrapper in such position that when around the brick, print, or roll the device or brand appears on one surface and the word 'Oleomargarine' on the edge of another is not in compliance with these regulations.

IV. Under no circumstances will any manufacturer or dealer be permitted to impress, brand, or mark upon any print, brick, or roll of oleomargarine, or on any wrapper covering the same, any device, word, or words calculated to induce the public to believe that it is a product of the dairy, or butter, even though the word 'Oleomargarine' appears on the same" (pp. 38-9).

(*See also Regulations, "Oleomargarine,"* **Appendix B**, pp. B 23-30)

16-2

No. 4585

United States Circuit Court of Appeals

EIGHTH CIRCUIT

JAMES J. BROUGHAM et al.
Appellants

vs.

BLANTON MANUFACTURING COMPANY
Appellee

Appeal from the District Court of the United States
for the Eastern District of Missouri

STATEMENT AND BRIEF FOR APPELLEE

S. MAYNER WALLACE
SHEPARD BARCLAY
Attorneys and of Counsel for Appellee

Copy of within Statement and Brief received this first day of December, 1916

ARTHUR L. OLIVER,
Of Counsel for Appellants

IN THE

United States Circuit Court of Appeals

EIGHTH CIRCUIT

JAMES J. BROUGHAM et al.
Appellants

vs.

BLANTON MANUFACTURING COMPANY
Appellee

No. 4585

STATEMENT OF THE CASE FOR APPELLEE

This is a suit in equity wherein appellee, as plaintiff, obtained a decree against the defendants (who are the local officers at St. Louis, Missouri, in charge of the federal Bureau of Animal Industry in that City) perpetually enjoining them from attempting to deprive plaintiff of the use of its trade-mark "**Creamo**", as applied to oleomargarine manufactured by plaintiff in St. Louis and shipped into other States as part of interstate commerce.

The case made by the bill will, for greater brevity, be outlined shortly, along with the facts in evidence, the most of which are undisputed.

The answers of defendants admit

> "that plaintiff has been for many years, and is now, a manufacturer of oleomargarine; that plaint-

iff has sold oleomargarine and offered it for sale in packages of various sizes and labeled or marked with the trade label or stencil 'Creamo' " (Rec. p. 14).

The answers then disclaim any knowledge of the value of plaintiff's trade-mark or of its prior approvals alleged, as well as any knowledge of many other facts averred by plaintiff; and then for defense set up that the Secretary of Agriculture (as the head of the Department of which the Bureau of Animal Industry forms a part) has been willing to approve the label of plaintiff

> "providing plaintiff would place upon said label suitable words indicating that the words 'Creamo Oleomargarine' constitute merely a trade name or brand, and the Secretary of Agriculture offered to approve said label modified so as to read 'Creamo Brand Oleomargarine', providing said label should be used only upon oleomargarine containing not less than 10 per cent of cream" (Rec., p. 17).

It is then alleged in the answer that

> "plaintiff has refused to modify its said label as requested by the Secretary of Agriculture, and that plaintiff has used said label upon its said oleomargarine as aforesaid, for the purpose of deceiving and causing the purchasers thereof to believe that the said oleomargarine produced by it is made from and contains a substantial quantity of cream; and plaintiff by the use of said labels, and by the use of advertising matter and letterheads sent to its customers, has succeeded in inducing the belief on the part of said customers that said oleomargarine is manufactured from and contains a substantial quantity of cream, whereas in truth and in

fact large quantities of the oleomargarine manufactured and sold by plaintiff under said label and trade name has contained no cream, and such of its product as has contained cream not over 10 per cent of cream, and all of its product, both that containing cream and that containing no cream, has been sold under the same label and trade-mark described in the bill of complaint.

And defendants say that because of the facts aforesaid, the said label, as so used by plaintiff, is deceptive and misleading, and that the Secretary of Agriculture, in exercising the discretion and judgment vested in him by law, has determined that said label is deceptive and misleading, and in consequence thereof has disapproved of said label and its use in connection with the manufacture and sale of plaintiff's said product" (Rec., p. 18).

The answer then recites that defendants, as officers of said Bureau, notified plaintiff that the use of said "trade name and label would not be allowed after the 1st day of March, 1914," but intended that plaintiff thereby should understand that after said date defendants would refuse to attach to packages of such manufacture the Government stamp of inspection, etc., (Rec., p. 18).

A provisional rule to show cause was duly issued (Rec., pp. 13-14) and the suit came on later for trial before his Honor, Judge DAVID P. DYER, at which time plaintiff introduced considerable testimony in support of the case made by its bill.

Plaintiff's Case

Plaintiff is duly incorporated as a manufacturing company, and has been for many years engaged in the

manufacture of oleomargarine in the City of St. Louis. In that business plaintiff and its commercial predecessors have been using since about 1902 (Rec., p. 33) a trade-mark, to designate the oleomargarine of its manufacture: the word **"Creamo"**, always used in connection with the name of oleomargarine to describe the product on or to packages of which said trade-mark is attached or affixed, in trade, and specifically in interstate commerce carried on by plaintiff with customers in many other States outside of Missouri.

Long before the enactment of the Act of Congress of June 30, 1906 (34 Stat. 674) for inspection of "meat and meat food products", plaintiff had adopted and used this trade-mark *"Creamo"* on packages of its oleomargarine under the regulations of the COMMISSIONER OF INTERNAL REVENUE (approved by the Secretary of the Treasury) to whom was entrusted by the Act of Aug. 2, 1886 (24 Stat. 209) the making of regulations to govern the marking, stamping and **branding** of the packages in which such oleo was contained for sale (Sec. 6, Act Aug. 2, 1886).

The trade-mark *"Creamo"* was approved by the Commissioner of Internal Revenue as a brand for oleomargarine, which appears by his letter in evidence (Rec., p. 29) of date, January 19, 1904, to the U. S. Internal Revenue Collector at St. Louis, through whom the application for approval was made.

Afterwards the **Department of Agriculture**, during the administration of Mr. Secretary JAMES WILSON (Rec., p. 82), by letter to plaintiff from the local inspector in charge of the Bureau of Animal Industry in St. Louis, under orders of his superior, May 24, 1907 (Rec., pp. 30-31), approved the trade label **"Creamo**

Oleomargarine", and again, in the same way, the Department gave an equally direct and emphatic second approval, July 8, 1912 (Rec., pp. 12, 46). The plaintiff after such approval by both Departments applied on January 6, 1908, for registration of its trade-mark ("*Creamo*" for oleomargarine) at the Patent Office of the United States (Rec., p. 46) and registration was duly accorded June 9, 1908, as appears by the certificate and record thereof in evidence (Rec., p. 47).

Plaintiff had duly paid the ($600) **annual internal revenue occupation tax** as oleo manufacturer (Rec., p. 34) and had conformed to all the regulations applicable (Rec., p. 34). The judicial notice of the Court (Rec., p. 38) was directed to the *Regulations* of the COMMISSIONER OF INTERNAL REVENUE, which are authorized by the law applicable especially to oleomargarine. Those regulations prescribe (with much detail) the form and terms of labels and marks on oleomargarine packages put up by the manufacturer.

Several of those regulations refer specifically to the brands of the manufacturer, and among them we note these:

> "All letters and figures affixed must be legible, and must be of such width and of such color as the collector of internal revenue may designate."
>
> "The above brand must be on the top only of each package" (referring to forms of label shown in another part of the same regulations, pp. 39-40, requiring the trade name of the product "*Oleomargarine*" to appear, in letters not less than ¾ of an inch in length).
>
> "The use by oleomargarine manufacturers, or dealers, of any private trade-mark, label, brand, picture, illustration, or other advertising or de-

scriptive device upon any print, roll, or other mold or design of oleomargarine offered for sale, consumption, or use, or upon any wooden or paper package or wrapper of any print, roll, or other mold or design of oleomargarine which conceals, or tends to conceal, the fact that the product is oleomargarine, is hereby prohibited."

"Under this regulation it will be seen that the use on statutory or other packages of oleomargarine of any trade-mark, label, brand, picture, illustration, or advertising or descriptive device indicating the oleomargarine to be a product of the dairy, or calculated to induce the belief that it is such dairy product, is inadmissible."

U. S. Int. Rev. Reguls. "Oleomargarine" (No. 9, Revised July, 1907) pp. 39-40

The foregoing regulation was referred to and part of it quoted (Rec., p. 38) at the trial.

It was in proof, without dispute, that the trade-mark "**Creamo**" was of great value; some experts in the business placing its value as high as $250,000 (Rec., p. 73) and others at "many fold" the amount spent to advertise and publish it, which amount was shown to be in 1913 about $10,000 per year (Rec., p. 71), and an average of $7,500 per year for ten years (Rec., p. 43).

The correspondence between plaintiff and the Department of Agriculture in 1914 was read showing that defendants as U. S. officers thereof notified plaintiff they would not pass or certify as inspected the plaintiff's product, intended for interstate commerce, unless plaintiff changed its trade-mark to "*Creamo Brand Oleomargarine*" (Rec., pp. 50, 60, 61, 62) which would have impaired fatally the utility of the trade-mark and destroyed its value as the undisputed testimony demonstrates (Rec., pp. 51, 62).

There was testimony (uncontradicted) that plaintiff had gone to great expense to advertise this special brand of oleomargarine; that from a small beginning the plaintiff's business had grown 500 per cent. to an annual volume of approximately $500,000, of which two-thirds was of goods of that brand; and the sales extend from Boston to California (Rec., p. 41).

The Defense

consisted of quotations from the *Meat Inspection law*, and **Regulations**, the main features of which relied upon are the following:

Part of the Act March 4, 1907, ch. 2907:

> "No such meat or meat food products shall be sold or offered for sale by any person, firm or corporation in interstate or foreign commerce under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted." (34 Stat. L. 1262.)
>
> Fed. Stats. Annot. (Supp. 1909) p. 48.

Of the Regulations of the Department of Agriculture (Bureau of Animal Industry), May 1, 1908:

> "Section 10. No meat or meat food products shall be sold or offered for sale by any person, firm or corporation under any false or deceptive name; but the established trade name or names which are usual to such products, which are not false and deceptive and which shall be approved by the Secretary of Agriculture, are permitted."
>
> Regulations (1908) p. 28, sec. 10

Defendant put in evidence some further regulations,

but as they are not relied upon in the learned Brief for the Government, we need not quote them.

Defendants also introduced some oral testimony:

One of the defendants, Dr. Brougham, admitted the purpose of his Department to be to refuse to certify as inspected for interstate shipments the oleomargarine products of plaintiff's factory if they bore the brand "**Creamo**" Oleomargarine, pursuant to his orders from his Department Chief on that subject (Rec., pp. 80-83).

There was no testimony that any one had ever been deceived or misled by the trade-mark "*Creamo*" on packages of Oleomargarine, or had ever supposed it to be cream or made from or of cream.

There was so little conflict of evidence that the suit is practically one of undisputed facts.

Perpetual Injunction

After the trial, argument and submission the learned trial Judge made the injunction prayed perpetual, as shown by the record, enjoining defendants

> "from attempting to deprive plaintiff, its successors and assigns, of the use of said brand, trademark and label described in said bill of complaint, used upon packages of Oleomargarine manufactured, packed, sold or offered for sale by said plaintiff, its agents, successors, assigns or customers, in the prosecution or course of the business now conducted by plaintiff as manufacturer and vendor of Oleomargarine"; etc. (Rec., p. 20).

(At the time of the decree the learned Judge filed a statement of his views.)

Memorandum Opinion of the District Court

(April 27, 1914, Rec., p. 19)

DYER, J.

"The complainant now is, and for many years last past has been, engaged in the manufacture and sale of oleomargarine in the City of St. Louis, and State of Missouri. The business of the complainant has steadily grown until its proportions are now very great. This, in spite of the fact that the annual license tax amounts to six hundred dollars, and in addition thereto a tax of ¼ of one per cent on each and every pound of white or uncolored oleomargarine manufactured by it, and ten cents a pound on each and every pound of colored oleomargarine manufactured by it, is imposed by law. The license tax of $600.00 per annum has to be paid at the beginning of each year, and the tax imposed upon each and every pound of white and colored oleomargarine has to be paid by the manufacturer before it is removed from the factory. Failure to comply with these requirements is followed by heavy penalties imposed upon the manufacturer. No package is allowed to leave the place of manufacture without being plainly marked 'Oleomargarine'. Failure to comply with the law in this regard imposes heavy penalties upon the manufacturer also. As far as the evidence shows in this cause the complainant has at all times complied with the law.

"Prior to 1904 the complainant began the use of a brand or 'trade-mark' upon portions of its product, in the form following:

"The Blanton Co.

St. Louis.

Creamo

Oleomargarine.

"This 'trade-mark' or brand (from the proof in the case) seems to have been approved by the Commissioner of Internal Revenue on the 19th of January, 1904.

"After the meat inspection act was passed, June 30, 1906, the complainant submitted the same brand to the Bureau of Animal Industry, and it was officially approved by it, as shown in a Department letter dated May 24, 1907, signed by Rice P. Steddon. To this letter is attached a sample of the label, which in all respects is the same as the one appearing in the bill of complaint in this case.

"The evidence shows that for more than five years the complainant used this label upon its products, not only without objection upon the part of the proper officers of the Government, but with their approval.

"An attempt, it appears, is now made by those in authority to reverse the decisions of their predecessors and to require a change to be made in this particular brand or 'trade-mark.'

"The complainant has expended large sums of money in advertising and popularizing its product, covered by such brand. It would be inequitable upon the part of the Government and its officers to stand by, approve and acquiesce in this brand for five or six years, and then, at great loss

to the complainant, refuse further to let its product be sold under this same brand.

"The complainant is entitled to the relief prayed for in its bill. An order to that effect will be entered" (Rec., pp. 21-22).

The defendants appealed from the decree and assign certain points as supposed errors (Rec., p. 23), which will be discussed, so far as may be necessary, in our Brief.

Joinder in Error

The appellee by its solicitors and counsel say there is no error to the prejudice of appellants in the record and proceedings of said District Court in said cause as by appellants assigned, or otherwise, and accordingly appellee prays that the decree herein may be in all things affirmed.

BRIEF OF THE ARGUMENT FOR APPELLEE

Plaintiff has had the use of the trade-mark, "Creamo", on oleomargarine of its own manufacture for many years; has expended large sums to increase its original value, after double approval by the Internal Revenue Department of the Treasury and by the Department of Agriculture, during former administrations from 1904 (Rec., p. 29) to 1912 (Rec., pp. 12, 31, 46). After having built up a good and growing trade, made large investment of capital, time and effort, a new set of federal officers, in 1914, under a different Secretary of Agriculture, suddenly attempt to sweep away the earnings and good will acquired in this trade-mark and demand its surrender, under penalty of withholding the certificate of local

inspection of the Bureau, without which certificate the transportation companies would not accept plaintiff's product for shipments in interstate commerce. As plaintiff's trade in this article, under this brand, has become of considerable value and has expanded throughout the United States, there was no alternative to parry such an attack on plaintiff's property rights in its trade-mark, except by resort to the court in the form described in the bill for injunction and relief, on which the learned Judge below accorded the relief needful to protect the rights of the plaintiff.

The points to be met, in the review sought in this Court by the Government, may be briefly treated along with our counter-propositions.

I

Defendants' claim that the Secretary of Agriculture is vested with exclusive authority to determine whether the trade-mark, "*Creama*", is false or deceptive.

We deny it, and also answer that the claim does not meet our case.

Several phases of that claim of defendants must be considered:

a. What is meant by "*trade name*" in the Meat Inspection law? Does it refer to trade marks or to the name by which the product is known to the trade, as meat, grease, lard, oleomargarine, etc?

The regulations (sec. 10) quoted by the learned counsel for the Government should be read in connection with other sections which refer to trade labels and show the difference between a trade label and a trade name. We quote both, presently:

"Section 10. No meat or meat food **products** shall be sold or offered for sale by any person, firm or corporation under any false or deceptive name; but the established trade name or names which are usual to such products and which shall be approved by the Secretary of Agriculture, are permitted."

The "product" in our case is Oleomargarine. That is the true and only name of the product. Our label or trade-mark is "*Creamo*", intended to identify to the trade the product, Oleomargarine, as made by plaintiff. That label is strictly in conformity to the regulations, two of which (in the same Article No. 18, and also in the defendants' testimony, Record, p. 76) define a trade label thus:

Regulation 18. TRADE LABELS (Regulations, p. 26; Record, p. 75):

SECTION 1. Upon each * * * "receptacle or covering containing any meat or meat food product, which meat or meat food product does not bear the marks 'Inspected and Passed', there shall be securely affixed, under the supervision of a Department employe, a **trade label** before such meat or meat food product leaves an official establishment. This trade label shall contain, in plain letters and figures of uniform size, the words '*U. S. Inspected and Passed*', the number of the official establishment at which the meat or meat food product is last processed, and the **true name of the meat or meat food product contained in such package.** The words "under the act of Congress of June 30, 1906", may be placed upon the label after the words 'U. S. Inspected and Passed'. An inspector shall not allow trade labels to be affixed until he is satisfied that the contents of the package are

sound, healthful, wholesome, and fit for human food, in accordance with the statements on the label." * * *

"Section 5. The essential features of a trade label are as follows, and shall appear upon each label:

The true **name** of the *product*.
The inspection legend
The establishment number."
(The *display* **type** is ours)

So that, under the evidence in this record, plaintiff fully conformed to the Meat Inspection law, whether or not it be held applicable to the branding or labeling of Oleomargarine packages.

The particulars of the evidence disclose how earnestly plaintiff attempted to avoid any controversy, appreciating how serious any difference is between a manufacturer of Oleomargarine and any Bureau or Department of the Government. Yet when this suit was brought, there seemed no other alternative.

The trade name of the product of plaintiff is on every package: "Oleomargarine", and the label describing it conforms to sections 1 and 5. The trade-mark "Creamo" is not part of the name of the "**product**", but is a proprietary term to identify it and distinguish it from the same general sort of trade "product" produced or made by others.

This topic was recently well treated in a case in this Court, in which the same law was involved, and the Court held that "the Secretary of Agriculture has nothing to do with the name of an article so long as it is not false or deceptive".

Packing Co. v. Houston, 215 Fed. 560,

The same decision approves a statement of the law in a well-known treatise as follows:

"'Trade-names have been frequently confused with trade-marks, and, broadly considered, they do include names which may constitute technical trade-marks. More accurately, however, trade-names are names which are used in trade to designate a particular business of certain individuals considered somewhat as an entity, or the place at which a business is located, or of a class of goods, but which are not technical trade-marks either because not applied or affixed to goods sent into the market, or because not capable of exclusive appropriation by any one as trade-marks. Such trade-names may, or may not, be exclusive. Exclusive trade-names are protected very much upon the same principles as trade-marks, and the same rules that govern trade-marks are applied in determining what may be an exclusive trade-name. Non-exclusive trade-names are names that are *publici juris* in their primary sense, but which in a secondary sense have come to be understood as indicating the goods or business of a particular trader. Trade-names are acquired by adoption and user, and belong to the one who first used them and gave them a value'."

38 Cyc, 764

Cady v. Schultz, 19 R. I. 193 (32 Atl. 915)
Fairbank Co. v. Soap Co. 102 Fed. 327
Laundry v. Bank, 120 Iowa 1 (94 N. W. 262)

Those comments on the law well expound the meaning of "trade-names" (as used in the Meat Inspection law), as distinguished from trade marks. The statute and section 10 of the regulations of the Department of Agriculture forbid false or deceptive trade names. Sections 1 and 5 clarify the meaning of the other provisions and should be read as part of them. "The *true name* of the **product**", prescribed by section 5,

therefore, satisfies the meaning and intent of the law. Here the "product" is oleomargarine. The word "*Creamo*" (in connection with it) designates the maker whose trade-mark it is, according to the principles governing the law of trade-marks, briefly expressed thus:

> "A 'trade-mark' may be defined as a symbol, consisting in general of a picture, a label or a word or words, applied or attached to the goods of a trader for the purpose of distinguishing them from the similar goods of other traders, and of identifying them as his goods, or as those of his successors, in the business in which they are produced or put forward for sale."
>
> Ency Brit. (11th ed.) "*Trade-marks*"

> "**Trade-mark.** A distinctive mark, motto, device, or emblem, which a manufacturer stamps, prints, or otherwise affixes to the goods he produces, so that they may be identified in the market, and their origin be vouched for."
>
> Black's Law Dict. "*Trade-mark*"

The term "trade name" is occasionally used in other senses, explained recently (1911) by an eminent writer. It may be the trading name of a person, firm or of any business association by which good-will has been built up, "although when used as a name, and not as a mark on vendible goods, it is not used as a trade-mark" (p. 275). Then a trade name may be applied to goods of one proprietor or maker when by long use that name has "come to mean" his goods, "though it is not, and never was, impressed on the goods themselves" so as "to be a trade-mark, properly so called, or within the recent statute" (p. 276). "It cannot be said to be gen-

erally admitted that a right of property can be acquired in a trade name" (p. 277); but its proper acquisition and use may lay a foundation to apply the principles of the law of unfair competition in case of piracy thereof by a competitor, beyond the incidence of the law of trade-marks. The "Camel hair belting" case is an illustration of that rule.

Sebastian, Trade-marks (5th ed.) 275-8
Reddaway v. Banham (1896), A. C. 199

All these careful anatomists of meaning, in this field of jurisprudence, agree that, while a trade name may have a certain status and value of its own in the commercial world, it does not thereby become a trade-mark. So that when the Meat Inspection law refers to "labels" and to "trade names" to describe the "product", which must be what it purports to be, a genuine trade-mark, original, arbitrary, fanciful and attractive, is not prohibited, but rather encouraged by the Meat Inspection Act, which should be accepted and interpreted so as to encourage and promote the use of trade-marks and other legitimate modes of extending commerce and stimulating individual efforts toward advancing honest business.

b But if this trade-mark is within the range of section 10 as quoted, what then?

Was that mark approved by the Secretary?

It was twice approved, first, in 1907 and again in 1912.

Let us then ask: where is the law to be found to authorize a Secretary to **revoke** an approval by a former Secretary? We know of no such law. On the contrary, the power to approve does not include power in a later incumbent of the same office to undo that ap

proval, after the party interested has invested large sums on the faith and in reliance upon that action of the approving Department.

Lane v. Watts, 234 U. S. 525
Jamestown v. Ry., 177 U. S. 130
Noble v. Logging Co., 147 U. S. 165
U. S. v. Ala. R. R., 142 U. S. 621
Emblen v. Land Co., 94 Fed. 710

We shall recur to this point later, in another connection.

c There is not a particle of evidence that "Creamo" as a trade-mark is "false or deceptive". The answer makes such a charge (p. 27), but no proof was introduced to support it, and it is obviously groundless. If any proof was to be had, we may be sure it would have been forthcoming.

d Even if the power was lodged in the Secretary to revoke an approval of such a trade-mark, there is nothing in the law or in any Act of Congress conferring conclusive jurisdiction in that matter. Clear terms would be necessary to remove the exercise of such power from the review of the courts. The issue would yet remain as to whether the trade-mark was, in fact, false or deceptive. Every well-organized and efficient court would normally assume that the owner of such property was innocent of such falsity or deception, until at least some testimony was produced tending to prove the contrary. Here there is none.

II

The claim by defendants that the trade-mark "Creamo" is false or deceptive is without merit even if it be regarded as a trade-name.

The only defense advanced is the claim that this trade-mark as applied to Oleomargarine is "false and deceptive." Yet the Government has proposed (in the correspondence read in evidence) to approve the use of the word "**Creamo**" if the word "*Brand*" was added thereto on the label; just as if anybody could imagine the word "Creamo" to be anything else but a "brand" of something; in this case, of **Oleomargarine! The suggestion to add the word** "brand" is like a proposal to paint the word "cow" on the animal itself in some great picture where that animal figures! It is like "painting the lily" or gilding refined gold.

The plaintiff's trade-mark "Creamo", as applied to Oleomargarine, was approved in 1904 by the Commissioner of Internal Revenue by the letter in evidence, already cited.

That was before Meat Inspection by the Bureau of Animal Industry began, and before the enactment of the Act therefor, June 30, 1906. After the latter Act went into effect, plaintiff was required by the officers of the new Bureau to submit its brand to that Bureau for approval; and the form now in use on the chief label (identical with the one copied in the bill of complaint herein) was officially approved by that Department in the letter of May 24, 1907 (which was read in evidence), signed by the Chief of the Inspection Division (Rec., p. 30). To that letter is attached a sample

of the label bearing the trade-mark ever since and now in use thereon, same as appears in the bill of complaint in this case. The approval of the Department required a slight amendment in the language appearing on one of the lesser panels of the label, and to that direction the plaintiff conformed at once, and has ever since obeyed. That approval was in May, 1907, during the administration of President Roosevelt, while Hon. James Wilson was Secretary of Agriculture.

The plaintiff, having thus obtained the approval of its trade-mark and brand by two Departments of the United States Government, viz: the Internal Revenue Department and the Bureau of Animal Industry, thought itself safe in offering its approved trade-mark in another Department, where, upon an application, filed in Jan. 1908, registration thereof by the Patent Office was accorded in June, 1908, under the federal law.

From the time of beginning the use of this trade brand "Creamo" until Aug. 1912, no objection thereto was interposed by any of the Departments. Meanwhile, on the faith of these approvals, and believing they were correct and just, plaintiff expended a great deal of money in pushing and extending its trade in Oleomargarine under that brand. That brand was advertised far and wide; and after the Internal Revenue Department (Feb. 24, 1908) upon amending the regulation of 1907 (T. D. 1323) permitted manufacturers to put up this product in small packages (of 1, 2, 3 and 5 lbs.) in cartons (such as are shown by the evidence here) so that the consumer can now receive and recognize the original package with the maker's *own mark* or brand thereon, the use of

the latter became much more of a trade asset, and has now acquired so substantial an importance and pecuniary value, that plaintiff felt obliged to protect it against the undue activity of the present Bureau of Animal Industry, in trying to reverse the ruling of former administrations on the same *identical facts.* Because, since 1904, the mark "Creamo" as applied to this product has been the same sort and kind of a brand, all the time.

The Government contention was that the label should be changed to read "Creamo Brand Oleomargarine." There is undisputed evidence in the record that such a change would greatly damage the value of the trade-mark. It would really be compelling plaintiff to adopt a new mark, and build up again (if it could be done) the labor of years. The word "Creamo" is obviously a brand for Oleomargarine, as "Cremo" is also a well-known brand for cigars, and "Cream of Wheat" is a brand for breakfast food and "Cream Baking Powder" is a brand for baking powder. These brands have never been held to arouse, in either instance, a deceptive suggestion or suspicion to or on the part of the trading public that either is composed, in whole or in part, of cream. They are only trade brands as is this of the plaintiff.

No evidence is before the Court to indicate that any person, whether customer, dealer or spectator, has ever bought the article or seen or used it on the supposition that it is a cream product.

In a recent decision of the Supreme Court in U. S. v. Lexington Mill Co., known as the Bleached Flour Case (Feb. 24, 1914) No. 538, Oct. T. 1913, the United States Supreme Court has sustained this theory in regard to cases brought under the Pure Food Law. In

that flour case it is held that while it might be possible that consumers of bleached flour could be poisoned, yet it was necessary that the Government should prove that the flour so bleached was actually poisonous and injurious to the public health, in order to warrant disapproval, and that ruling was cited later in the Coca Cola case (241 U. S. 265).

That the trade word "Creamo", as used by plaintiff on Oleomargarine, does not imply that it is made from cream is more plain from the testimony, given in this case, that the Government officers (in one of their demands for a change in plaintiff's existing label) proposed that plaintiff might insert the words: "Contains No Cream" (following "Creamo Brand Oleomargarine"); but that would not always be true, for sometimes some cream is used in making this product.

The brand "Creamo", while it is arbitrary, original, fanciful and not generic, attempts to give a new, clean, unique and pure trade brand to the product of plaintiff's manufacture. Many examples of valid trade-marks are familiar in the decisions. The best of such devices are those which carry some suggestion of a pretty, or happy or romantic idea or thing. There is nothing improper or illegal in that characteristic of such trade labels whose very purpose is to be attractive within the range of truth and fair dealing.

We mention a few:

"Cream baking powder" (37 App. D. C. 137)
"Cream baking powder" (8 Biss. 398)
"Cream Rolled Oats" (171 Fed. 989)
"Swan down", complexion powder (85 Fed. 774)
"Vienna Bread" (in N. Y.) (62 How. Pr. 92)
"Purity" oleo (83 Off. Gaz. 295)

The evidence shows that plaintiff, in 1908, obtained

of the Commissioner of Internal Revenue a modification of the oleomargarine regulations, so as to permit that product to reach the consumer in small packages bearing this brand; and thereby helping to protect the manufacturer and the Government against fraud, and to secure the direct appeal of this trade-mark in a business way to the customer, as to every retail package. That regulation is now as follows:

Intern. Rev.

T. D. 1323 (Oleomargarine)

Circular of Feb. 24, 1908.

The change is shown therein in these words:

> "Manufacturers are not permitted to put up oleomargarine in wooden, tin, or stone packages as subdivisions for domestic use. The use of paraffined wrappers or cartons for prints or bricks to retain the flavor and form of the contents is permissible, provided such packages taken separately are not safe or suitable for transportation, and are marked, stamped, or branded as required by the regulations relating to wrapper covering any brick, print, or roll of oleomargarine."

The above regulation is a substitute for sec. 5 (page 39), U. S. Int. Rev. Regs. No. 9 (July, 1907) for OLEOMARGARINE.

Plaintiff's establishment is supervised and inspected by the Internal Revenue Department, the law (sec. 6) and regulations of which specially and especially apply to all branding, marking and stamping of Oleo (Act. Aug. 2, 1886, amended May 9, 1902).

The regulations of that Department are minute and specific and have been already sufficiently described.

The claim of defendants that "*Creamo*" is false or deceptive as a trade-mark ill comports with the Government's proposal to allow its use with the word "brand" added. That was a concession fatal to the claim now advanced, although the claim is inherently unsound, and borders on the frivolous, although we intend no disrespect to any of the officers of the Government by that observation. At best, their claim is untenable, we respectfully submit.

III

The Meat Inspection Act does not apply to regulate marks and brands on Oleomargarine packages.

The status of Oleomargarine and of Oleomargarine brands is specifically fixed and defined by the Special law and regulations in regard to them, in secs. 6 and 20 of the Act of Aug. 2, 1886 (24 Stat. 209).

The Court will observe that the Meat Inspection Act provides that no "meat or meat food product" shall be sold or offered by any person or corporation for sale in interstate or foreign commerce under any false or deceptive name. It is a matter of common knowledge as well as of science that while oleomargarine is often a meat product, it may also be made from materials containing no meat whatever (Rec., p. 88). In view of the fact that Congress has seen fit to apply to a special product a defined name: "Oleomargarine", and that this name appears on that product in plaintiff's label; the latter, in that respect, certainly complies with the Meat Inspection Law.

A reading of Section 6 of the Oleomargarine Act of Aug. 2, 1886, will satisfy experienced Judges that it fully covers the matter of marking and **branding**

Oleomargarine. Plaintiff, following that section of the law, has complied fully with all its requirements and with all the regulations under that law. It submitted the word "**Creamo**" as a suitable brand to the Internal Revenue Department, in 1904, and it was fully approved in the form in which it has been used ever since.

Abundant authority exists for the trite rule that special legislation takes precedence over any general statutes or language, even on the same subject. In view of the fact that the special Oleomargarine Law sets out **specifically** how the product shall be marked and branded, it should follow that the general law (if it applies at all) would not apply to those matters specifically covered by the Special Act applying strictly to Oleomargarine.

But a reading of the Meat Inspection Law will disclose that it is wholly and purely a law covering the inspection and sanitation of meat packing establishments. If an Oleomargarine factory is a meat packing establishment, this law at most could only go to the sanitation and inspection of raw and finished products, and to such examination as would see that the label bears the true name of the **product**, which has long before been covered by the legislation defining that product as **Oleomargarine**.

It is undisputed in the evidence that the plaintiff protested against the attempt of the Bureau to revise the "*Creamo*" label (Rec., p. 51) and also against the inspection of its product under the Meat Inspection Law (Rec., p. 50) when it was first inaugurated; and the evidence also shows without contradiction that Oleomargarine can be manufactured from a selection

of oils which does not include any meat fats or animal fats (Rec., p. 88).

The Act of Congress (August 2, 1886) known as the Oleomargarine Law was passed, and as amended May 9, 1902, was intended to levy a heavy revenue tax and to protect the public from dealers selling oleomargarine for butter. It was thought necessary to use the Internal Revenue Department as a vehicle to accomplish that purpose, it being conceded that while Congress could not usurp the police powers of any State, it might impose and collect a revenue tax in the mode which was adopted. Incidental to the collection of that revenue, Congress saw fit to say on what manner of packages of the product it would collect that tax, and enacted that the product on which the revenue was to be collected should be **marked and branded** in a certain way. Furthermore, the law specified that the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, should make all needful regulations for carrying into effect that law. Those regulations were made in great detail and some of them have been already quoted.

We respectfully submit that they are exclusive.

The Secretary of Agriculture has ruled that the Pure Food Law does not apply to butter or to the coloring of butter, as that is covered by specific legislation (the Oleomargarine Act, which defines both Oleomargarine and butter). We claim that it should, therefore, follow that, if the Pure Food Law does not apply to butter (because, as is held, incidentally the latter is covered in the Oleomargarine Law), then the Meat Inspection Law is within the same principle and should be held

inapplicable to the products within the terms of the Oleomargarine Law.

The rules of interpretation applicable to this branch of the case are well established.

> "Where Congress has designated an article by a specific name and imposed a duty upon it, general terms in the same or in another act, though sufficiently broad to comprehend such article, are not applicable to it; in other words, the article will be classified by its specific designation rather than under a general description."
>
> 24 A. & E. Envy. Law (2nd ed.), 890
> Chew Hing Lung v. Wise, 176 U. S. 156
> Bogle v. Magone, 152 U. S. 623
> American Net, Etc., Co. v. Worthington, 141 U. S. 468
> Arthur v. Rheims, 96 U. S. 143
> Arthur v. Davies, 96 U. S. 135
> Arthur v. Stephani, 96 U. S. 125
> Arthur v. Zimmerman, 96 U. S. 124
> Arthur v. Lahey, 96 U. S. 112
> Movius v. Arthur, 95 U. S. 144
> Dieckerhoff v. Miller (C. C. A.), 93 Fed. Rep. 651
> Zante Currants, 73 Fed. Rep. 183
> U. S. v. Davis (C. C. A.), 54 Fed. Rep. 147
> Smythe v. Fiske, 23 Wall. (U. S.) 374
> Reiche v. Smythe, 13 Wall. (U. S.) 162
> Homer v. Collector, 1 Wall. (U. S.) 486

The same rule applies where an article is specifically designated as exempt from duty.

> Chew Hing Lung v. Wise, 176 U. S. 156

And that rule is asserted in a vast array of decisions of which a few only need be cited.

> Hayes v. U. S., 150 Fed. 63
> U. S. v. Borden, 133 Fed. 840

"It is an established rule of construction that, where there are both general description and specific designations of an article in the same act, it is the intention of Congress that the article be classified by its specific designation, rather than under the general description."

Homer v. The Collector, 1 Wall. 486 (490)
Reiche v. Smythe, 13 Wall. 162 (165)
Smythe v. Fiske, 23 Wall. 374 (380)
Movius v. Arthur, 95 U. S. 144 (146)
Arthur v. Lahey, 96 U. S. 112 (113)
Arthur v. Stephani, 96 U. S. 125 (126)
American Net Co. v. Worthington, 141 U. S. 468 (474)

On these decisions we respectfully submit that there is no jurisdiction in the Department of Agriculture to control or regulate the marks or brands on packages of Oleomargarine in so far as the details of branding and marking them are covered by the specific regulations and directions in the Internal Revenue law, as to Oleomargarine.

Meat inspection by the Department of Agriculture (B. A. I.) is authorized for "meat and meat food products" by the law of June 30, 1906. Oleomargarine is not mentioned in that Act, and the whole tenor thereof shows it is not intended to supplant the revenue laws as to trade labels on Oleomargarine (Act of Aug. 2, 1886) which (sec. 14) also provide for inspection of ingredients of Oleo and a hearing if same be supposed to contain deleterious ingredients. Oleo is defined by sec. 2 of the Act of Aug. 2, 1886; it can be made (as so defined) without any material which might properly be classified as a meat food product (Rec., p. 88).

It is a general rule (often applied by the U. S. Su-

preme Court) that specific provisions of law as to one subject are paramount and controlling as to that subject, despite a general law (either prior or later) covering a larger class, including also the one subject. It has often been so held as to revenue laws, as well as other laws.

U. S. v. Nix, 189 U. S. 205
Hartranft v. Langfield, 125 U. S. 135
Seeberger v. Cahn, 137 U. S. 97
Am. N. & T. Co. v. Worthington, 141 U. S. 468

That is one of the large features of this case. We hope it may have close attention now that plaintiff, much against his will, has been obliged to invoke the aid of the Courts to protect its trade-mark, and the label thereof.

To state our contention briefly, it is this: that the meat inspection amendment (June 30, 1906) is not intended and cannot be construed properly to apply to the Oleomargarine industry so far as to regulate the brands used on Oleomargarine, because the Revenue laws governing the manufacture and sale of Oleomargarine declare explicitly as follows:

"Section 6, Act of August 2, 1886:

> "That all Oleomargarine shall be packed by the manufacturer thereof in firkins, tubs or other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe", etc.
>
> (Regulations, 1907, Oleo. p. 7)

Under the foregoing statute, a series of minute regu-

lations have been made by the Commissioner of Internal Revenue, a few of which we mention (Regulations No. 9, July, 1907), U. S. Intern. Rev. The brand or stencil on every package of Oleomargarine (before removal from the factory) is prescribed (p. 39) and the letters and figures of the brand must be of a certain dimension. The use of private marks (or trade-marks) is carefully provided for as follows (p. 40):

> "If manufacturers of Oleomargarine desire to place upon the outside of their original wooden package, contemplated in Section 6 of the Act of August 2, 1886, their names, or some word or mark descriptive of the quality of the product, they may do so, provided they also brand or stencil on the package the word "Oleomargarine" beneath such name, word, or mark, so as to be read as a word in association with such name, word, or mark; and, if desired, figures and words may be added, indicating the form or manner in which the contents are packed, as shown in the following illustrations:

JOHN DOE, Manufacturer of OLEOMARGARINE. 50-1-lb. Plain Bricks.	RICHARD ROE, Manufacturer of Perfection OLEOMARGARINE. Solid.
JOHN DOE, Manufacturer of Standard OLEOMARGARINE. 20-1-lb. Fancy Rolls, Short	RICHARD ROE, Manufacturer of Crescent OLEOMARGARINE. 52-1-lb. Rolls, Long.

> "Provided, the word 'Oleomargarine', as used in such labels, marks, brands, etc., is branded or stenciled in plain roman letters, not less in size than the letters used in the manufacturer's name, with the word describing the brand in letters not greater than one-half that size.

"And provided, also, the figures and words describing the form in which contents are packed be not greater than one-half the size of the letters prescribed for the word 'Oleomargarine'."

The next page of the same regulations is devoted to details of regulation on this subject. Pages 38 to 40 of the above regulations should be carefully read. They show to what extent of detail the internal revenue regulations deal with the brands on Oleo packages. The Oleo law is very special on this subject.

Of course, we know that Congress might, if it saw fit, provide that trade brands on Oleomargarine packages might also be revised and inspected by another Department (so far as interstate shipments are concerned); but our question now is: has Congress shown, by the laws, such an intent. We think not. Our claim is that the general language in the Meat Inspection (B. A. I.) law of June 30, 1906 (as amended to this date) does not have that effect. It is expressed in terms to apply to "meat and meat food products" in general; but all through the long lines which follow that general description of the subject of the act, we see careful directions as to the slaughtering, packing, meat-canning and rendering of "cattle, sheep, swine, and goats". We see directions for post-mortems of those animals, and provisions as to their carcasses. If you will read the Act throughout (and it appears in a convenient form for that purpose in the B. A. I. "Regulations for Meat Inspection". Order 150, effective April 1, 1908, pp. 45-48) you will see no word or phrase which could possibly suggest a purpose to submit the brands on Oleomargarine to the inspection provided by that law

or to remove those brands and trade-marks from the supervision and inspection provided, in much detail, by the Internal Revenue regulations concerning the product in question, known by the trade name of *oleomargarine*.

Now, in this state of the statutory law, well-known rules should be applied. The special provisions of the Internal Revenue law exclude application of the more general provisions of the Meat Inspection (B. A. I.) statutes, even if the latter would by their terms otherwise apply to Oleomargarine.

To quote Chief Justice MARSHALL:

> "That a law is the best expositor of itself, that every part of an act is to be taken into view for the purpose of discovering the mind of the legislature, and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act, are among those plain rules laid down by common sense for the exposition of statutes which have been uniformly acknowledged."
>
> Pennington v. Coxe, 2 Cranch. 52

All statutes *in pari materia* should be considered, and "the general language found in one place may be restricted in its effect to the particular expressions employed in another", if such appears to have been the intent of the enactment.

Homer v. Collector, 1 Wall. 302 ("Almonds" case)
Atkins v. Disintg. Co., 18 Wall. 301-2
U. S. v. Nix, 189 U. S. 205

Judge PHILLIPS on this subject has said:

> "It is among the recognized canons for the con-

struction of statutes that, when the legislature resort in an enactment to much more special provisions respecting a given matter or offense, it must be taken and understood as an exception to the more general provision or general statute, especially so in the interpretation of criminal laws. This rests upon the doctrine that, 'where the harmony of the law requires, one statute will be construed as cutting short, that is, curtailing the effect of another'. So that 'a thing given in particular shall not be taken away by general words.' "

State v. Green, 24 Mo. App. 231

This principle has been shown by legislation in England.

In the English statutes concerning Pure Food and Drugs (as lately amended) there is express mention made of Margarine, in order to bring the latter within the terms of the former, because Margarine was treated (as in the American law) specially and separately in another statute on that particular subject. These English statutes demonstrate our point by acting clearly in accord therewith.

See 62 and 63 Viet. c. 51 (1899)
(Margarine) 50 and 51 Viet. c. 29 (1887)

In America the Regulations of the Internal Revenue Commissioner, as to marking and branding Oleo packages, have the force of law, and plaintiff is and has been following same to the letter, and the statute is clear as to the mode of branding Oleo packages.

Act Aug. 2, 1886, sec. 6, U. S. Int. Rev. Regs.
No. 9 Oleo, pp. 7; 38-42

We claim that said law and regulations should be

held exclusive, in the absence of any showing of a different legislative purpose. Over fifty decisions can be found as to special provisions being paramount to general terms in statutes.

26 A. & E. Ency. L. (2 ed.) p. 618

We are well aware that the paramount precept of all construction of law is to reach the real intent of the terms of the law as disclosed by them. But the subordinate rules are helpful to reach that intent. Here there is nothing in the Meat Inspection law to indicate that it was intended to supplant or to repeal the terms of the special law already in force to govern the branding and marking of packages of oleomargarine.

IV

The "Creamo" trade-mark is a valid one, in every and all aspects.

It was not necessary to resort to definitions to vindicate the validity as a trade-mark of such a word as is here in question. It is original, fanciful, not generic, not descriptive of the trade product apart from its maker. It was selected to identify the "make" of its maker, and its value now is unquestionable. It carries a good will which is a most valuable species of property. Comparison with decisions is scarcely needful to support its validity.

If the Court was called on, as an original proposition, to decide whether "Creamo", as applied to Oleomargarine packages for sale could be a valid trade-mark, and the only objection was the assertion that "Creamo" was "false or deceptive" in itself (for there is no extraneous evidence to support any such claim)

would any well-informed Court hesitate to hold it a lawful trade-mark as against such an objection?

No court would regard such an assertion seriously without testimony to support it.

U. S. v. Coca Cola Co., 241 U. S. 265

The learned Brief for the Government (p. 11) asserts that "the statute prohibits interstate transportation of same" (referring to plaintiff's oleomargarine products) "because of its **deceptive name**". But that is the nearest approach to any suggestion or argument to show in what respect it is supposed that the term "*Creamo*", as applied to Oleomargarine (and always in connection with the name of that product) could possibly mislead or deceive any one. The word is an arbitrary term, original with the manufacturer, coined for its particular use. It is not to be found in any dictionary, or in any literature, prior to its construction as a trade-mark, to indicate a first-class quality of oleomargarine sold by plaintiff. We have already argued to some extent that no false or deceptive suggestion is in it. The Bureau officers probably imagine that because "Cream" is part of the word it must needs imply that cream is a constitutent of the product. Much research is not necessary to ascertain that cream itself is a term of various meanings.

Cream as a noun has at least seven definitions of which only one refers to "the oily or butyraceous part of milk" which gathers on top when the milk is left undisturbed.

Cream also has at least six definitions as a verb.

Murray, Eng. Dict. (1893), pp. 1149-50

One of its definitions by the last cited authority is this:

3. "The most excellent element or part; the best of its kind; the choice part; the quintessence."

We quote from another standard authority one of its 6 definitions of cream:

"4. The best part of a thing; the choice part; the quintessence: as, the *cream* of a jest or story"
Century Dict. (1911), p. 1337

Perhaps the inventor of the word "Creamo" as a trade-mark for its present use on Oleo packages had in mind the idea that this product was the "Cream o' Oleomargarine", or the **best of that article** (to follow literally one of the quoted definitions). To express excellence the word cream is of wide and familiar use.

The "Cream" trade-marks have been held good:

Braun v. Coyne, 125 Fed. 331
Price Co. v. Tyfe, 45 Fed. 799

If "Cream" is good, "Creamo" is certainly a more fanciful and less descriptive, less generic word or brand for a trade-mark.

See as to good marks:

"Taylor's Persian thread"
Taylor v. Taylor, 2 Eq. Rep. 290 (23 L. J. Ch. 255)
"Dunn's Fruit Salt baking powder" (41 Ch. D. 439)
"Sliced animals" (a confection), 93 N. Y. 59
"White House" coffee
Dwinell-Wright Co. v. Co-operative Supply Co., 148 Fed. 242

In 1882 in a case in New York, plaintiff sued for an injunction on a "claim to the exclusive use of the word ALDERNEY in connection with Oleomargarine". The Court (per Judge Van Brunt) held:

"In respect to Oleomargarine, the use of the word 'Alderney' is entirely arbitrary and in no respect descriptive of the article, and the case of Hier agst. Abrahams (82 N. Y. 519) sustains as a trade-mark application of such arbitrary word, even if used in conection with others" (489).

Lanferty v. Wheeler, 63 How. Pr. 488

It appears scarcely necessary at present to refer to more than a few cases, sustaining our mark, as the Government does not appear to dispute its validity.

When a trade-mark has been established and approved three or four times, and has been long used and a valuable good will built up, where is the statutory power in the Department of Agriculture to deprive plaintiff of its property-right therein by its withdrawal and reversal of prior approval and rulings of its predecessors?

This identical point was decided positively in regard to the issue of a patent, holding that when granted there is no power to reverse that order by those authorized to issue the patent. We respectfully submit that a trade-mark such as ours is governed by the same principles as a patent, there being no existing provision of law authorizing the B. A. I. to reverse and cancel the approval given to such use.

McCormick v. Aultman, 169 U. S. 609

That ruling is based on an important principle, applicable also to the case at bar.

The great stress in the learned brief for the Government is laid on the claim that the Federal Bureau officers have a continuous, uninterrupted and inexhaustible power to approve or to revoke or revise trade labels or marks; and

that their action approving or revoking the use thereof is not subject to any judicial review. To support that contention we observe the Government cites a decision of the District Court in New York under the tea inspection Act of March 2, 1907, in which the powers of the Board of Examiners of tea were considered.

Macy v. Browne, 215 Fed. 456

But an appeal was prosecuted from that ruling, and the judgment of Judge Hough was reversed, the Court of Appeals in an opinion by Judge Lecombe (Judges Coxe and Ward concurring) holding that the Examiners of tea had exceeded their powers. It was held:

> "Within the field of investigation confided to them, the Board of Examiners are the sole judges; but they have been given no authority to extend the field of investigation beyond the limits staked out by Congress."
>
> Macy v. Browne, 224 Fed. 361 (reversing same case, 215 Fed. 456)

That ruling expresses the ground of our present suit, that the honorable officers of the Department of Agriculture are to restrain their authority within the field staked out for them by Congress.

The citation of other decisions concerning the scope of executive powers involving discretion reveals nothing in conflict with our contentions. Several of the citations refer to the discretionary powers of the U. S. Land Department in reference to the disposal of public lands. One decision which is cited is a fair type. It holds that the Interior Department decision on a subject within their discretionary powers is final, but the Court (per Mr. Justice Brewer) adds that it is "equally true" that "the action of the Land Department cannot

override the expressed will of Congress, or convey away public lands in disregard or defiance thereof".

Burfenning v. Ry., 163 U. S. 323

That ruling is in principle the same as was announced in the last Macy v. Browne decision.

See, also, City v. Ry., 216 Fed. 735

It may be well to ask whether, if the finding of the Department is to be treated as conclusive, the plaintiff may not rely on the "conclusive" effect of the approvals of its trade-mark "Creamo" by the same Department in 1907 and in 1912, as well as by the Interior Department in 1904?

No attempt has been made by learned counsel for the Government to point out any statute giving power to withdraw an approval after it has been acted on for years and large sums have been expended on the faith of that approval.

There has been no change of circumstances.

"*Creamo*", as a brand on the product to be sold, has not changed in meaning since 1904. It was as suggestive then as now, and so in 1907 and 1912, when the Department of Agriculture approved it, officially and after considerable attention to details of the label submitted (Rec., pp. 39-54). The superior officers in charge prior to 1913 doubtless had the proper idea that "Creamo" was a fictitious, original word, proper as a trade-mark, and that, if it suggested anything, it was merely the claim of the owner to superior excellence in the product designated thereby.

> "One may make a trade-mark out of a name or phrase which has some element of suggestion about it. 'Ceresota' is a good trade-mark for flour, although perhaps it is made up by the addi-

tion to the name of the goddess of grain of the last two syllables of the three hard wheat states of Minnesota and the Dakotas."

Chapin-Sacks Co. v. Creamery Co., 231 Fed. 550

But, we should not prolong this argument.

That the remedy by injunction is appropriate, if our other grounds of suit are well taken, seems clear on principle and authority. The remedy by injunctive orders and decrees to protect property has been so often granted in similar circumstances to prevent official action in excess of statutory powers that it seems scarcely needful to go further than cite a few familiar instances thereof.

Noble v. Logging Co., 147 U. S. 165
Caldwell v. Robinson, 59 Fed. 653
Hoover v. McChesney, 81 Fed. 484
La Chappelle v. Bubb, 69 Fed. 482
Bank v. Merchant, 18 Fed. 841
Kirwan v. Murphy, 83 Fed. 275 (this Court)

We respectfully submit that the decree of the District Court is in accord with equity, sound principle and fair dealing between the Government and its citizens, and that it should be affirmed.

S. Mayner Wallace
Shepard Barclay
Solicitors and of Counsel for Appellee

November, 1916

BROUGHAM ET AL. *v.* BLANTON MANUFACTURING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 247. Argued March 19, 1919.—Decided April 21, 1919.

The Meat Inspection Law applies to oleomargarine. P. 498.

Registration of a trade-name under the Trade Mark Law has no bearing on the right to use it under the Meat Inspection Law. P. 499.

Under the Meat Inspection Law the power to determine whether a trade-name is false, or deceptive, is lodged with the Secretary of Agriculture, and his determination, if not arbitrary, is conclusive. *Houston* v. *St. Louis Independent Packing Co.*, *ante*, 479. *Id.*

The power of the Secretary is a continuing one; approval of a name at one time not precluding its disapproval later. P. 501.

Held, that the Secretary, having approved the name "Creamo" as a designation of an oleo product, containing 30% cream, and which was strongly extolled on that ground, was amply justified in denying the use when the cream had been greatly reduced or omitted, and replaced by skimmed milk; notwithstanding evidence that the manufacturer invested heavily upon the faith of the approval. *Id.*

243 Fed. Rep. 503, reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Frierson for appellants.

Mr. Shepard Barclay, with whom *Mr. S. Mayner Wallace* was on the brief, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Appellants are officers of the Department of Agriculture charged with the administration of the meat inspection acts. The appellee, Blanton Manufacturing Company, is a manufacturer of oleomargarine and brought this suit against appellants to enjoin and restrain them from interfering with it in the use of the word "Creamo" as a trade-mark in the manufacture and sale of its product and the use of that mark upon packages of its product shipped from St. Louis in interstate commerce.

The District Court granted the injunction and its decree was affirmed by the Circuit Court of Appeals. 243 Fed. Rep. 503.

As a ground of suit and recovery the company relies upon the following facts and they express, in a general way, its contentions. To what extent they should be modified will be apparent as we proceed.

The company is a manufacturer of oleomargarine, having a factory at St. Louis, Missouri, which comprises a group of buildings specially arranged and equipped for the purpose of such manufacture and where the company has made an investment of many thousands of dollars. Its product has been sold in packages of various sizes, marked with a trade label or stencil adopted for that purpose, which trade-mark is the word "Creamo," used since 1904. Its trade has become extensive and valuable, its product has acquired a high reputation and become a source of profit, increasing yearly, and an interruption in the use of its trade-mark and label would cause serious injury in a sum exceeding $5000.

January 6, 1908, the company applied to the United

States Patent Office for the registration of "Creamo" as a trade-mark, it was duly registered June 9, 1908, and the company has since enjoyed the use of it and made contracts with dealers under it, and the company's oleomargarine is known to its customers far and wide by that label, trade-name and mark.

In 1906, after the enactment of the Act of June 30, 1906, c. 3913, 34 Stat. 669, concerning the inspection of "meat and meat food products," the company was informed by the Bureau of Animal Industry that its plant would be subject to inspection under the act of Congress. The company objected but yielded to avoid controversy and hazard to its interest, and an inspector was installed. The company, however, contends that its manufacture of oleomargarine is not subject to the power and authority of the bureau.

The Secretary of Agriculture, in 1907, approved the company's trade-mark of "Creamo" and upon the faith of the approval the company has used the same and by expenditure of large sums of money has extended its popularity and publicity; but, notwithstanding, Dr. Brougham (one of the appellants) threatened the company that from and after March 1, 1914, its use would not be allowed and that the inspector in the establishment of the company would enforce the threat and attempt to prevent the use of the trade-mark and label.

The trade-mark is duly registered in the office of the Secretary of State of the State of Missouri.

Some of the contentions of the company are somewhat difficult to handle—indeed, to get at in separation. One of these is that the Bureau of Animal Industry has no authority or power over the company's product, its manufacture or market. The basis of the contention is that the food products indicated by "the meat inspection act do not include a food product bearing the trade-name 'oleomargarine,' prescribed by a special revenue law to

be used in the sale thereof, and that statutory name is not 'false or deceptive' when so used." And for the contention the company relies on *Homer* v. *Collector*, 1 Wall. 486, and *Chew Hing Lung* v. *Wise*, 176 U. S. 156. The further contention is that § 6 of the Oleomargarine Act (24 Stat. 209) requires the article to be packed in a particular way which is not the same as that prescribed by the meat inspection act and was in force before the latter was enacted, and therefore excluded "an article like this oleomargarine having a 'trade-name' by law." And yet again that the Food and Drugs Act, which is "*in pari materia*, enacts that an 'article of food' containing no poisonous or deleterious ingredients shall not be deemed misbranded" which shall thereafter be known as articles of food under their own distinctive names and not offered for sale under the distinctive name of another article if the name be accompanied on the same label or brand by the name of the place where manufactured or produced. And it is said that the company's oleomargarine bears that statutory trade-name and hence should not be considered misbranded. *United States* v. *Coca Cola Co.*, 241 U. S. 265, is adduced to support the contention. We do not consider it necessary to follow the company's argument in detail. It is rather involved. We disagree with it. In other words, we are of opinion that the meat inspection act is applicable. This was the decision of the Circuit Court of Appeals. The company's oleomargarine is a meat product, compounded, among other things, of oleo oil and neutral lard.[1] Besides, it is not sold under the name of oleomargarine alone; there is the qualifying addition of the word "Creamo," and used, as we shall hereafter see, to qualify and distinguish it from other combinations which might bear the designation oleomargarine.

[1] Defined in the testimony to be "a lard produced from the leaf of a pig, neutralized so as to take the taste and smell out of it."

We pass to the consideration of the meat inspection acts (of June 30, 1906, and March 4, 1907, 34 Stat. 669, 1260). They require an inspection of all meat and meat food products prepared for interstate and foreign commerce and provide that no persons or firm or corporation shall offer for transportation, and no carrier shall transport in interstate or foreign commerce, any such products unless marked "Inspected and passed," and that "no such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted."

It is the contention of the Government that the use of the word "Creamo" is deceptive and induces the belief that cream is a substantial ingredient of the oleomargarine. The company earnestly contends to the contrary and that, besides, the designation "Creamo" has received the approval of the Department of Agriculture and has been sanctioned as an appropriate trade-mark by the Interior Department (Patent Office). The latter contention may be immediately put to one side. The test of the product is the meat inspection laws, not the trade-mark laws, and therefore we are concerned with the action of the Department of Agriculture and not with that of the Interior Department. And so intimately is the case concerned with the action of the Department of Agriculture that the basic and dominant contention of the Government is that to the department is committed the power of determining the fact of the influence of the name and label of the company. In other words, the power of determining whether a trade name is "false or deceptive" given by the law to the Secretary of Agriculture is, when exercised, conclusive of the falsity or deception of the name.

(*Bates & Guild Co.* v. *Payne*, 194 U. S. 106, and cases cited; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659), and the power necessarily is a continuing one. The contention and the cited cases have been approved very lately in *Houston* v. *St. Louis Independent Packing Co.*, *ante*, 479, in which it is declared that the decision of the department, unless arbitrary, is conclusive. A sketch of the evidence, therefore, becomes necessary.

As early as 1904 there was, if not controversy, discussion between the company and the department. It was not of serious extent. The company was indulged in the representation that its product was composed of "Butter, Oleo Oil, Neutral, Cream and Salt" and that these were "churned in an abundance of richest cream, resulting in a perfect substitute for butter." But there was objection to a statement that the oils were "doubly inspected" by the United States Inspectors, "insuring absolute purity and cleanliness." Such was the condition of things, we may deduce from the testimony, until 1908.

We may say, in passing, that in the beginning 30% of cream was used and the word "Creamo" was selected to suggest such ingredient to repel the criticisms of the butter makers who represented that oleomargarine was produced from "sewerage and dead horses." But it appears from the testimony that the use of cream was discontinued, skimmed milk being used instead, it having been discovered by the government chemists that it was not the butter fat in the milk which produced the flavor, but it, the flavor, came from skimmed milk.

October 2, 1912, an objection came from the department to the use of the company's label and discussion ensued, extending over a period of twelve or fifteen months. The department then announced that the use of the word "Creamo" was "considered deceptive and misleading and its future use could not be permitted." It was, however, suggested that "Creamo Brand Oleomargarine"

be used, the words to be displayed alike in prominent type, and that cream should be used in the product, its use having been discontinued. Upon this ruling of the department and the resistance of the company to it the contest was waged for a time. The company contended that the word "Creamo" was arbitrary and not descriptive; the department asserted the contrary and that it "conveyed a false inference to the consuming public," and, notwithstanding an offer by the company to use 10% of cream, insisted upon the use of the word "brand" and required also some modifications of the label. It further declared that if the requirements of the bureau should not be complied with on and after March 1, 1914, the inspector in charge at St. Louis would be instructed to prohibit "the use of all labels, wrappers, cartons, etc., which do not bear the bureau stamp of approval and number."

Such is the testimony in outline, and it is manifest that the action of the department was not arbitrary but given upon a consideration of the circumstances and the fact of the trade-name "Creamo" having a deceptive implication to the consuming public.

But against the decision of the department the company opposes the previous approval of "Creamo" as a trade-name and alleges that upon the faith of the approval the company has used the same and by the expenditure of large sums of money—testified to be about $10,000 a year—has made its product public and popular under that name. The answer to the contention is that the meat inspection acts contemplate and confer a continuing inspection and power, a power necessarily not exhausted by one exercise. Besides, the approval was given at a time when the company used 30% of cream in its product and declared that it and other ingredients were "churned in an abundance of richest cream, resulting in a perfect substitute for butter." The indulgence of the department had justifi-

cation. When the practice of the company changed, when it commenced to vary the percentages of cream and finally used none at all, naturally the department changed its ruling. The company can, therefore, claim no right from the prior ruling. There may be value in the use of the trade-name "Creamo," as the company asserts, and detriment, it may be, in any change or qualification of it; but its value may be in its deception—its suggestion of cream appealing to the popular preference for that article over skimmed milk, though the scientific judgment may be in favor of the latter, a judgment possibly not known or if known not appreciated or accepted. And the deception would not be taken away and the purpose of the law satisfied by the addition of 10% of cream which the company offered to make. At least such was the judgment of the department, and we cannot pronounce it arbitrary.

It will be observed from the quoted provisions of the meat inspection act that two conditions are presented: If "Creamo Oleomargarine" is to be regarded as the name of the product it is false and deceptive, whatever it may have been formerly; if it be asserted to be an established trade-name it has not received the approval of the Secretary of Agriculture and hence its use is without legal permission.

Decree of the Circuit Court of Appeals is reversed and the case remanded to the District Court with direction to dismiss the bill.

MR. JUSTICE MCREYNOLDS took no part in the decision of the case.